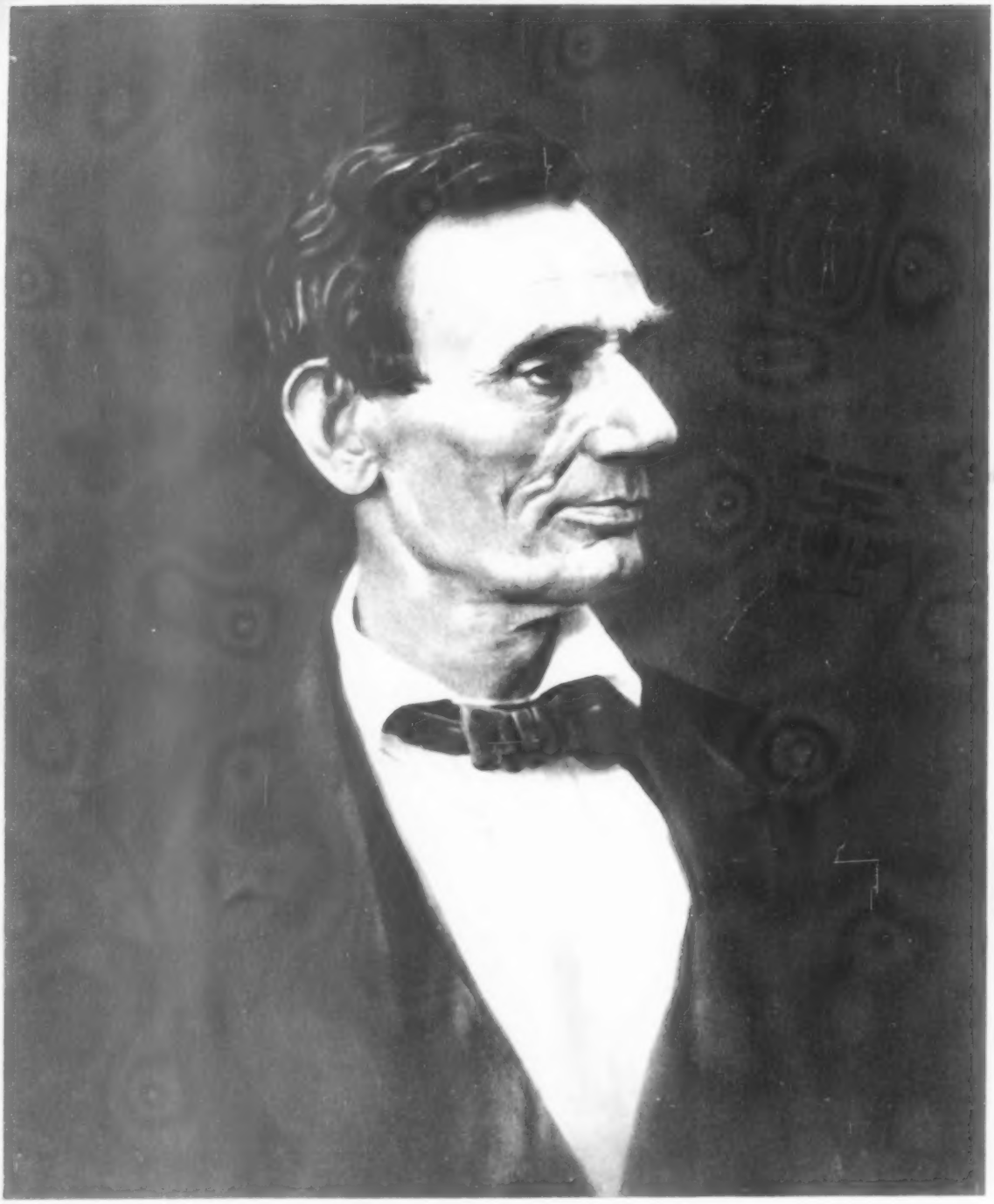

Abraham Lincoln

AMERICAN BAR ASSOCIATION JOVRNAL

February 1945

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In THIS ISSUE

Our Cover

Because this is the month of Lincoln's birth, we use again a portrait of that illustrious lawyer-soldier. Every one knows that in Lincoln's day he was one of the recognized heads of the Illinois Bar. Few of us, however, know how great he was as Commander-in-Chief of our armies. May we recommend, therefore, that those who have not already done so, read, "The Military Genius of Abraham Lincoln," written in 1926 by Brigadier General Cohn R. Ballard of the technical staff of the British High Command, in which that recognized authority in military science calls Lincoln " 'The Strategist of the North' . . . the forerunner of that which is now called the High Command."

The Constitution and the Treaty to Prevent War

On the supreme question concerning an agreement between nations to prevent war, Honorable William D. Mitchell, former Attorney General of the United States, examines the provisions of the Constitution which deal with the treaty-making power and those of the powers of the President as Commander-in-Chief of our military forces. The terms of the proposed treaty are analyzed.

Reorganization of the Federal Government

Congress is now engaged in plans for the reorganization of the federal government. President Simmons submits an expression of his considered views as to such a reorganization. He deals particularly with the reorganization of the judicial and legislative departments.

The Proposed Treaty with Mexico

Jean S. Breitenstein and Dean Roscoe Pound close their debate on the administrative features of the proposed United States-Mexican Treaty on the conservation and distribution of water in the Basin States.

The Legislative Standards of the Renegotiation Statutes

G. E. Rosden, of the District of Columbia Bar, contributes a critical and painstaking study of the legislative standards of the renegotiation statutes. Whether or not lawyers agree with Mr. Rosden's conclusion that "the Supreme Court would do the country a disservice were it to reverse itself and hold such standards sufficient," they will be interested in his discussion.

ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at $1 each of the topical index of the first 23 volumes.

Books for Lawyers

Reginald Heber Smith contributes a deeply moving review of "Yankee from Olympus"—the book which began as "a labor of love" and became "a best seller." Walter P. Armstrong writes concerning humorists of the law, and finds much which is amusing in Fred L. Gross' "What Is the Verdict?" This issue contains also a review of a highly important book, published January 25, Norman Hill's "Claims to Territory," which deals realistically with one of the most provocative of the causes of war and one of the most difficult of the problems of international adjudication. "Escape via Berlin" is depicted as a narrative by a lawyer concerning himself and what he dared and risked in resisting totalitarian government. We publish also a commentary on Beardsley Ruml's forecasts of "Tomorrow's Business," which are likely to be of much importance to lawyers. "The Twilight of Individual Liberty," by Hamilton Vreeland, Jr., is shown to be a trenchant but disturbing analysis of present trends. Other useful and interesting books of current issue are reviewed.

Review of Supreme Court Decisions

Two Japanese exclusion cases (Supplementing the Japanese curfew cases) present the conflicting views which seem almost irreconcilable when war threatens the safety of our country, unless the rights of our citizens of foreign ancestry are temporarily suspended.

In an eminent domain case there came to the high Court for the first time the problem on which there has been doubt and debate in many of our tribunals. In *U. S.* v. *General Motors* the view long held that a condemnee could not recover "consequential damages" in actions when the fee is sought to be acquired, was reaffirmed, but it was held that damages to stock and fixtures can be taken into account in the ascertainment of just compensation, when only a temporary right of occupancy is taken.

Here also will be found the review of an important declaration of the inoperative character of certain provisions of Fair Labor Standards Act to penalize the employment of children under sixteen as telegraph messengers.

Other important decisions are also reviewed.

The Constitution and the Treaty to Prevent War

by William D. Mitchell

OF THE NEW YORK BAR

FORMER SOLICITOR GENERAL AND FORMER ATTORNEY GENERAL OF THE UNITED STATES

The proposal for a treaty between the United Nations to maintain peace and use force to suppress aggressor nations has aroused discussion about the constitutional procedure we must follow if we assume an obligation to provide armed forces for those purposes.

Before we agree to this, we should know how it is to be done, and what officers or agencies of our government are to be entrusted with the fateful decisions on peace or war. The purpose of this article is to describe as simply as possible the constitutional procedure to be followed.

The Terms of the Proposed Treaty

The tentative proposals of the Dumbarton Oaks Conference include an international organization of United Nations, with a General Assembly on which all peace-loving nations may be represented. The primary purpose will be to induce nations to settle their disputes by peaceful means and refrain from aggression. If peaceful methods fail, resort to economic sanctions or to armed force to overcome an aggressor nation is proposed. Primary responsibility for such measures is to be vested in a Security Council, with a membership of eleven, representing eleven United Nations. The United States, Great Britain, Russia, China and France are to have permanent representation on the Council. The other six nations to be represented will be designated from time to time by the Assembly. The decision to use armed force against an aggressor nation would rest with this Council. The proposal does not state whether the decision will require unanimous vote of the eleven representatives or may be made by a less number, or whether, if by the less number, the five permanent members must agree, or whether a nation may sit in judgment on its own case. Each nation is to agree to supply armed forces to carry out a decision to assail an aggressor. The character and strength of those forces, and the areas in which they are to be used remain to be agreed upon. The proposal is silent as to how a nation may withdraw from the arrangement and how much notice it must give of intention to withdraw. Thus, the most difficult points are left unsettled. We will assume that all these details will be agreed upon and embodied in a treaty pursuant to the clause in the Constitution that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur,"[1] and that the United States would become pledged to the use of its armed forces under the conditions stated in the treaty.

The Constitutional Questions

That brings us to the question whether the President would then be in a position to perform this pledge. Will the treaty alone be sufficient authority for the President, at the call of the Security Council of the United Nations, instantly to use our armed forces against an aggressor, or, because of the constitutional power of the Congress to declare war, must he first obtain an Act of Congress, in which the House of Representatives participates, authorizing him to begin hostilities? If congressional action is required to authorize hostilities, must the Congress act on each case as it arises, or may it delegate to the President a continuing power to use force against an aggressor whenever an obligation so to do arises under the treaty? A great metropolitan daily states this question to be "whether the constitutional power of Congress to declare war could be by-passed by a simple statutory enactment by Congress or by a treaty ratified by the Senate."[2] Shall our representative on the United Nations Security Council have freedom of judgment when voting for or against the use of force, or should he vote as the President directs?

Some treaties are "self-executing" in the sense that they require no legislation to make them effective. A treaty giving aliens the right to own land in the United States is an example. When ratified, such a treaty becomes law, and needs no supporting legislation,[3] as the Constitution provides that the Constitution and Acts of Congress and "all Treaties made, or which shall be made, under the Authority of the

1. Constitution, Article II, Section 2.
2. New York *Sun*, November 18, 1944.
3. *Asakura* v. *Seattle*, 265 U. S. 332.

United States, shall be the supreme Law of the Land."[4]

A treaty, the performance of which requires an expenditure of public funds, is not self-executing. The Constitution states that:

> No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.[5]

So, the treaty to buy Alaska from Russia at a stated price could not be performed until the Congress appropriated the necessary funds.[6] This special provision in the Constitution prohibiting the withdrawal of funds from the Treasury *for any* purpose, except pursuant to an appropriation by Congress, makes it clear that a treaty by itself gives no authority to expend public funds. This principle is beyond dispute.[7] The use of our armed forces against an aggressor nation would be an expensive affair, the money for which can only be made available to the President by appropriation acts, and the Constitution forbids appropriations for the armed forces "for a longer Term than two Years."[8] Even the appointment of our representative on the Security Council would require appropriations for his salary and expenses. The President could not perform our obligations under the proposed treaty without the aid of Acts of Congress appropriating the needed funds. If a treaty involves the expenditure of money, our obligations under it may be repudiated if the House of Representatives refuses to vote for the necessary appropriations. The House has never failed to pass the necessary appropriation bills.[9]

Another instance of the probable need for legislation to make a treaty operative is where a reciprocity treaty obligates the United States to reduce its existing tariffs on imports, in consideration of reciprocal reductions by the other contracting nation. Relying on the constitutional requirement that "All Bills for raising Revenue shall originate in the House of Representatives"[10] the House has steadfastly insisted that an act reducing tariffs is as much a revenue act as one imposing duties or raising them, and all such measures must originate in the House, and since a treaty does not originate there, it cannot by itself operate to reduce tariffs, and an Act of Congress, the bill for which originates in the House, is necessary to put a reciprocity treaty into effect. The Senate, once disposed to question the position of the House, seems to have acquiesced in it.[11] The proposed United Nations Treaty would not alter our revenue laws, and the case of reciprocity treaties is mentioned here only to show that claims that legislation is required to support such a treaty have had their basis in a constitutional provision expressly giving to the House of Representatives a special voice in the subject matter of the treaty.

We come next to the question whether a treaty obligating the United States to join in the initiation of hostilities against another nation authorizes the President to perform the obligation without a declaration of war by the Congress or an Act of Congress authorizing the hostilities. *In the absence of such a treaty* the President has no constitutional power to *initiate* war without congressional authority. The Constitution gives to Congress the power "to declare War."[12] The word "declare" means something more than an announcement. It includes the power to authorize the initiation of war. "Congress has the sole power, under the Constitution, to make that declaration, and to sanction or authorize the commencement of offensive war."[13] In the old days it was considered unfair to begin a war without a previous declaration, and doubtless that is why the word "declare" was used in the Constitution. Now, nations have a way of attacking first and declaring war afterwards.

The vesting of this power in the Congress excludes the idea that the President, merely by virtue of his powers as President or as Commander-in-Chief of the armed forces, is free to *initiate* war at his own discretion. Of course, if hostilities against us are begun by another nation, it is the duty of the President, without waiting for action by Congress, to use available armed forces to resist the attack. There, war is thrust upon us. He does not initiate it. In 1862, in the Prize Cases, involving the validity of the blockade against southern ports, instituted by the President after the South had begun hostilities by attacking Fort Sumter, the Supreme Court said[14] of the President:

> He does not initiate the war but is bound to accept the challenge without waiting for any special legislative authority.

On the other hand, speaking of the President's powers, the Court said:

> By the Constitution, Congress alone has the power to declare a national or foreign war. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic state.

There have been numerous instances where the President, without a declaration of war, has used our armed forces to commit hostile acts. The attacks on French shipping in 1789, the case of the Barbary pirates, the march to Pekin to protect our embassy during the Boxer Rebellion, the Vera Cruz incident, the landing of forces in Haiti and Venezuela, Pershing's chase into Mexico after the bandit Pancho Villa, and other occasions where marines have landed in foreign ports to protect the lives of American citizens, are examples. Some of these affairs were authorized by the Congress beforehand, or promptly ratified afterwards. Others were not. To justify the action of the Executive branch, where no authority from Congress was obtained, it has

4. Constitution, Article VI.
5. Article I, Section 9.
6. Hyde, *International Law* (1922), Vol. 2, § 524.
7. *Congressional Record*, Vol. 58, Pt. 4, p. 3687; *Willoughby on the Constitution*, 2nd Ed., Vol. I, 549-551.
8. Constitution, Article I, Section 8.
9. *Digest International Law*, Hackworth, Vol. V, p. 198-9; Hyde, *International Law*, Vol. 2, § 524.
10. Article I, Section 7.
11. *Digest International Law*, Hackworth, Vol. V, p. 179-180; Hyde, *International Law*, Vol. 2, § 525.
12. Article I, Section 8.
13. Whiting, *War Powers*, 43rd Ed. pp. 38-40.
14. 2 Black 635, 668. See Hamilton, in the *Federalist* No. LXIX; *Little* v. *Barreme*, 2 Cranch 170, 178-9.

been argued that the object has been to protect Americans abroad, and that the steps taken were not likely to and did not result in war, and that the hostilities were directed, not at nations or their people but at disorderly elements. These historic incidents have recently been cited to support the view that, without an Act of Congress and regardless of any treaty, the President may have authority to use our armed forces to assail aggressor nations. The argument has even been pressed to the point of asserting that the initiation of war against an aggressor nation has for its ultimate purpose the protection of the lives and property of American citizens.

The incidents mentioned have no analogy to the action proposed by the United Nations Treaty. The use of armed forces to attack, and defeat or disarm an aggressor nation, is war, or would surely lead to war unless the aggressor surrendered without a struggle. It is stretching the Constitution past the breaking point to contend otherwise. If the President can *initiate* war by using our armed forces to engage in warlike operations, without authority of an Act of Congress, it can only be because of the existence of a treaty committing us to that course.

In the case we are considering, there would be such a treaty, and there is plausible ground for the opinion that the treaty alone would give him authority to act—always with the qualification that the Congress must supply the money.

A treaty, ratified by the Senate, is said by the Constitution to be the "law of the land" and of equal force with an Act of Congress in the same field.[15]

Treaties may include any matter which "is an appropriate subject of international agreement."[16]

The President already has wide powers in the field of international relations. There is force in the argument that if a treaty binds us to engage in military operations, that alone is enough authority for the President to act, unless through lack of money or sufficient armed forces he is without the means to perform our treaty obligations. A treaty should not require the aid of legislation merely because it operates in a field in which the Congress may legislate. The Constitution contains no such limitation on the treaty power. To hold otherwise would require the House to concur in all such treaties, notwithstanding the constitutional provision that ratification by the Senate alone is enough. Among the legislative powers of the Congress listed in the Constitution, the power to declare or authorize war is not set apart in any way, and there is no special provision singling it out as one in which the House of Representatives has any exclusive or special function. Except for the one above-mentioned relating to appropriations, no clause in the Constitution expressly limits the treaty power by requiring an Act of Congress to make the United Nations Treaty effective. This question, however, is one on which opinions may differ[17] and on which the courts have never passed. Heretofore little has been written about it. It was discussed in the Senate in the debates over the League of Nations. As a practical matter there is no present need for a decision of the point. It is really an academic question. If prevailing public opinion approves the treaty, and the Senate by a two-thirds vote ratifies it, the House should, and doubtless would, join in appropriate legislation to make it effective and enable the President to act promptly. Surely, the House would not leave any doubts in the minds of our allies or of potential aggressor nations as to whether we intend to perform our solemn international pledges. To do so would destroy the value of the treaty as a deterrent to aggressors.

Act of Congress May Give Congress Power to Prevent Force

Since the performance of our obligations would require appropriations of money, in which the House must join, why should not the Congress implement the treaty in all other appropriate ways and avoid any question as to whether, whenever an obligation arises to use our armed forces, the President must apply to Congress for an act declaring war or authorizing the initiation of war? Even if it be conceded that despite the treaty, and because of the war power of the Congress, the President may not act without authority from the Congress, it is clear that the Congress may give him continuing power to perform our treaty obligations without delay. The war power is a legislative power, and legislative power cannot be delegated to the President, but it would not be an unconstitutional delegation of legislative power for the Congress to enact a law authorizing him to use our armed forces to the extent and in the manner prescribed in the treaty, whenever he finds that an obligation so to do has arisen under the terms of the treaty. Legislation along such lines has been sustained by the Supreme Court in an unbroken line of decisions.

The underlying principle is that the Congress may state the principle to be followed and the conditions under which it is to be applied, and delegate to the President the power to determine whether the stated conditions exist, and to act accordingly. A simple example of such legislation is the "flexible tariff" act of 1922. There the Congress provided that existing tariff rates should from time to time be raised or lowered to meet the differences in costs of production at home and abroad. It delegated to the President the power to ascertain those differences, and gave him continuing power to alter the tariffs accordingly. Fixing tariffs is a legislative power, but the Supreme Court held that the flexible tariff act did not make an unconstitutional delegation of legislative power,[18] saying of the President:

> He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

The only recent controversies

15. Constitution, Article VI.
16. *Holden* v. *Jay*, 17 Wall. 211, 243; *Geofroy* v. *Riggs*, 133 U. S. 258, 266.
17. Hyde, *International Law*, Vol. 2, § 503: footnote 1.
18. *Hampton Co.* v. *U. S.*, 276 U. S. 394.

over this principle have been whether particular statutes state with sufficient certainty the facts which the President must find to exist, before he acts. The Supreme Court held in 1936 that in a matter affecting foreign relations, a field in which the President already has special powers, the statute may prescribe with less certainty than in the field of domestic law, the facts to be found by the President before action.[19] No one familiar with the decisions on this subject would doubt the constitutionality of an Act of Congress giving the President continuing power to use our armed forces to attack aggressor nations whenever he finds that an obligation to do so has arisen under the terms of the United Nations Treaty. Such a statute would remove all ground for debate as to whether Congress must declare or authorize war. Its enactment would enable the President to act without delay. If the matter be left in such state that he could not act under the treaty in any case, without the delays incident to the passage of legislation, the aggressor could complete his conquest before we make a move. If aggressors knew such delays were probable, the treaty would have small value as a deterrent to aggression.

Authority of Our Representative on the Security Council

Finally, there is the question about the extent of the discretionary power of our representative on the Security Council, when voting for or against the use of armed force. Some public speakers have assumed that he may be free to exercise his own judgment. The American people will never consent to his having such authority. If they once gain the belief that the United Nations proposal requires it, they will turn against the entire plan. We should not and will not entrust our vote for peace or war to anyone other than the President of the United States. Although the President cannot spend the time in Europe to sit on the Council, he may be given control over our vote. Before the days of the transatlantic cable and the wireless, it was necessary to give a wide discretion to our representatives abroad. That is no longer the case. Ambassador Dawes once said that under modern conditions an ambassador needs only a stout pair of legs.

If the proposed treaty is made and ratified, the Congress will doubtless pass an act prescribing the method of appointment of our representative, fixing his compensation and authorizing appropriations for his salary and expenses. That act should also provide that on questions of applying sanctions or using military force, our representative must vote as the President directs. Those familiar with the operations of our government realize that our representative would always consult the President, but our people would feel easier if his authority is expressly limited by law. If the mere act of voting for use of force be considered as the initiation of war, the Act of Congress may also give the President continuing power so to vote, whenever he finds the fact to be that an aggression is threatened and immediate use of force is necessary to effect the purposes of the treaty. The decisions above cited sustain such legislation.

Summary

To summarize, our procedure may include the following:

1. A United Nations Security Treaty negotiated by the President and ratified by a two-thirds vote in the Senate, providing for the use of armed forces to prevent aggression and maintain peace. It will prescribe all the conditions under which we agree to use our armed forces, and may establish a Security Council, with authority to decide when force shall be used, on which we will have a representative. The treaty will doubtless prescribe a method by which a nation may honorably withdraw upon giving reasonable notice.

2. The treaty may be followed by Acts of Congress—

(a) providing for the manner of appointment of our representative on the Security Council, fixing his compensation, authorizing appropriations to pay his salary and expenses, and requiring him to seek and obey the instructions of the President in voting for or against the use of sanctions or armed force;

(b) granting to the President continuing authority to cast our vote for the use of force if he finds aggression is threatened and use of force without delay is necessary to effect the purposes of the treaty, and continuing authority to use our armed forces to the extent stipulated in the treaty, whenever he finds and proclaims the fact to be that conditions exist which give rise to an obligation so to do, and authorizing appropriations to be made to enable the President to perform our treaty obligations;

(c) periodically making the necessary appropriations to defray the expense of performing our treaty obligations.

It is hardly conceivable that if the treaty is ratified by the Senate, the House of Representatives, by refusing to pass the necessary legislation, will put the nation in the position of repudiating a solemn international agreement. If we ever desire to withdraw, it should be done honorably in the manner prescribed in the treaty.

If after ratification by the Senate the President has any doubt as to whether the House will pass legislation necessary to execute it, he may withhold exchange of ratifications to await House action. Even after ratification by the Senate, the President, by withholding this exchange, can prevent the treaty from binding us.[20] Charles Evans Hughes once said:

> It is a very serious matter for the treaty-making power to enter into an engagement calling for action by Congress unless there is every reason to believe that Congress will act accordingly.[21]

We should not make the treaty unless the House of Representatives is ready to support it ungrudgingly

(Continued on page 66)

19. *U. S. v. Curtiss-Wright Corp.*, 299 U. S. 304.
20. Hyde, *International Law*, § 520
21. Address at the Union League Club, March 26, 1919; Hyde, Vol. 2, p. 24, note 1.

Reorganization of the Federal Government

by David A. Simmons
OF THE HOUSTON, TEXAS, BAR
PRESIDENT OF THE AMERICAN BAR ASSOCIATION

> *Liberty has never come from the government. Liberty has always come from the subjects of it. The history of liberty is a history of limitations of governmental powers, not the increase of it.*
> —WOODROW WILSON

Just before the Christmas recess the Congress passed Senate Concurrent Resolution No. 23, known as the Maloney-Monroney Resolution. It provided for a committee of twelve, six Senators and six Congressmen, to study the organization and operation of the Congress and to recommend improvements with a view toward strengthening the Congress, simplifying its operations, improving its relationship with other branches of the government, and enabling it better to meet its responsibilities under the Constitution. The appropriation for the committee, ten thousand dollars, is a mere pittance in these days of billion dollar appropriation bills, but the announced function of the committee is one that is of special interest to us both as lawyers and as citizens.

One Congressman, in urging adoption of the resolution, said he expected to submit a proposed constitutional amendment providing that Congressmen and Senators should be prohibited from acting as messenger boys for their constituents and required to give their entire time to their legislative functions. He said another representative should be elected from each district to a second congress, the function of which would be to keep in touch with the executive departments and bureaus, run errands for constituents, and do that mass of detail which now takes ninety per cent of the time of the present Congressmen and Senators. Being a realist, he said they would have to prohibit the new representative errand boys from running for the Senate or Congress for a number of years, for, obviously, these officials would have a wonderful opportunity to cut the ground from under the statesmen, who thereafter would function solely in the higher legislative atmosphere.

Profession Should Give Committee Their Views

I hope the lawyers of our country will give serious thought to the work of the new committee on reorganization of the government and will give it the benefit of their ideas as to the scope and extent of that reorganization. Obviously, we may leave to the committee the details concerning the functioning of Congress itself—that is, such matters as the consolidation of the committees of the two houses and the legislative procedure in the enactment of a law.

In newspaper reports concerning the creation of this committee it was said the legislation was for the purpose of lifting Congress out of the "snuff box and wig era." I think the committee will discover that it will be necessary to go back to the fundamental principles of government of the "snuff box and wig era" in order to accomplish the purposes it has in mind. It will also discover that legislative efficiency under our form of government is no simple matter. The edicts of a powerful executive, be he emperor or what-not, are much more efficient to formulate than the enactments of a Senate of ninety-six senators and a House of Representatives of four hundred and thirty-five congressmen.

Federal Powers Separated into Three Branches to Prevent Autocracy

Our form of government has three branches, not for the purpose of promoting efficiency but, as Mr. Justice Brandeis said in the case of *Myers* v. *United States*, to preclude the exercise of arbitrary power. The founders were determined to save the people from autocracy and, as a consequence of their knowledge of the history of the governments of the world, they decided upon a republican form of government, with checks and balances against the misuse of power. Recognizing that the legislative, executive and judicial were separate functions of government, they placed those powers in

separate departments. There is no equivocation about the language. The Constitution provides that all legislative powers granted shall be vested in a Congress consisting of a Senate and a House of Representatives. All the executive powers are given to the President, and all judicial powers vested in a Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

Ninety Per Cent of Regulations Product of Executive Bureaucracy

Notwithstanding the express mandate of the Constitution and the intention of the founders to vest all legislative power in the Congress, we now find that of the multitude of regulations being issued in the name of the federal government, ninety per cent are the product of executive bureaucracy and less than ten per cent are from acts of Congress. Today the business of regulating the lives and conduct of the citizens is not only the largest, but the most important activity in the country. It is not my purpose at this time to decry that fact. Let us leave to others the debate as to whether this bureau system is fascistic, communistic, or foisted upon us by naturalized citizens of European background who have never assimilated the theories of our government but are familiar with the intermingling of all power in the same hands in the countries from which they came. Neither is it necessary to assert that the executive, new deal or old deal, is engaged in a conspiracy to strip the Congress and the courts of their power and reduce them to subordinate positions.

"Equal and Coordinate" Branches of Government Are Hardly Equal

From the standpoint of numbers and expense, the so-called "equal and coordinate departments of government" today are anything but equal. In the legislative branch we have 96 senators, 435 representatives, and a few thousand miscellaneous employees, mainly clerks and stenographers. The appropriation for the current year is approximately $13,900,000 for salaries and other expense. The judicial department consists of 255 judges, supreme and inferior, and a few thousand clerks, commissioners, stenographers, reporters and bailiffs. The current appropriation for that department for salaries and expenses, including jurors' fees and expenses, is $13,618,000. With one hundred thirty-six million people in this country, the cost of the finest judicial establishment in the world is ten cents each. The cost of the congressional establishment is a fraction over ten cents.

The last tabulation that came to my attention showed 3,016,000 civilian employees of the executive department, with expenditures of more than six billion dollars for their salaries and expenses. This does not include the military and naval personnel nor the direct war expenditures.

If we are optimistic and assume that after the war the civilian personnel of the executive department will be reduced one-half, we may still hazard the assertion that there will be ten times as many persons in that department and the so-called independent establishments and bureaus engaged in legislative research and drafting as there are in Congress itself. We may also safely assert that there will be ten times as many people in the executive branch judging controversies between the citizens and the government and hearing alleged violations of governmental regulations as there will be in the entire judicial department.

That commingling of the three powers in the executive branch would produce abuses should have been apparent. That it was a violation of our tradition should have been a warning, for, after all, tradition is but the memory of past experience. Why is it that man learns but to forget and, forgetting, must learn again?

That Congress Is Overworked Cannot Justify Bureaucracy

The standard justification of the bureaucrats for withdrawing the legislative power from Congress and conferring it upon those "ex-officio experts," as Dean Pound calls them, is that Congress simply has neither time nor experience, even if it has the capacity, to investigate, and legislate in detail, on all the multitude of matters with which bureaucracy concerns itself. As Robert H. Jackson, then Attorney General, said in 1941:

> Serious practical consequences wait upon the distribution of power between the President and the Congress. When the Court held that NIRA code-making could not be delegated to the President and the executive agencies, it destroyed any possibility of the code technique in industry, for everybody recognized the impossibility of Congressional action on hundreds of codes.

Bureaus Now Enact More Legislation Than Congress

In other words, the standard apology for the failure of Congress to act, and the justification for giving broad legislative powers to the executive department, is that Congress is so weighed down that most of the legislative functions must be performed by somebody else after Congress has granted in broad terms the general authority in a particular field. I think that is an afterthought. Because the bureaus now enact ten times as much legislation as Congress, and because Congress itself is swamped with such legislation as it is enacting, it is easy to say that the impossibility of performing the task necessitated giving legislative powers to a hundred alphabetical agencies, even though NIRA code-making fell by the wayside.

Someone may say that the increasing complexity of life in our society has made necessary vastly increased legislation. I am familiar

with the cases which, little by little, have justified the executive encroachment upon the powers of the legislative and judicial departments. In essence, the dictum of the bureaucrats has been accepted: That the legislative task is beyond the power of Congress and the judicial task beyond the power of the courts, at least in those lesser fields that now govern ninety per cent of the activities of the people.

I deny this dictum and believe that Congress has unwittingly defaulted in its obligation to the people. Does this have a strange sound? Everyone else is denouncing the executive for grasping at power. Who created the agencies? The Congress. Who appropriated the money to finance them? The Congress. Who gave them the power to make laws governing the liberty and property of the citizens? The Congress. Who inserted in those laws that there should be no appeal in the average case from their bureaucratic courts? The Congress. Who provided that if there was any evidence to sustain the finding of the bureaucrat, the finding should be final and binding upon the courts? The Congress.

Growth of Agency Jurisdiction and Personnel

The groups and blocs which secured the enactment of the great variety of legislation setting up a hundred different bureaus to regulate a hundred different activities each wanted its pet law zealously enforced by its friends, without having their energies dissipated in other fields of endeavor. The natural result has been that every bureau and agency has felt that it must expand its jurisdiction and personnel in geometric proportion, in order to justify the faith of its friends and lay a foundation for more and bigger appropriations to come. The blocs or groups lobbying these acts through Congress, some of whom were acting through and with the executive department and some strictly on their own, also wanted and secured the power of legislation. Neither did they wish any control by the judiciary.

Their aims and views are perfectly understandable. What is not understandable is how Congress, as the representative of all the people of this great nation, ever permitted itself to be led into so altering the form of our government that it is now hardly recognizable.

Is there a remedy? I think there are several. Some deal with attitudes, some with governmental organization, and some with fundamental principles. For instance, in the last category it would help if, as a people, we could formulate, approve and observe certain reasonable and attainable personal ethical standards. A little more honesty and fair dealing in business might conceivably have obviated the necessity for several of the present bureaus and commissions. A little more honesty and fair dealing in the future may bring about a relaxation of some of the present restrictions.

Just before the war, *Reader's Digest* published several articles reporting on nation-wide surveys of the repair and service trades and professions, particularly garages, radio repair shops, watchmakers and one or two others, which indicated what they called "chiseling" or "overreaching" in 49% to 64% of the places tested. This is a sad commentary on those trades, and a mass of indignant letters following the articles charged that the situation was no different in a multitude of other businesses. Such conditions cannot fail to bring about a demand for government regulation and control of all such activities in the public interest.

Decentralization Desirable But Hardly Feasible

A change of attitude by our people might help toward a solution of this problem. Hatton W. Sumners some time ago wrote an article entitled, "Don't Blame the Bureaucrat." He said bureaucracy was caused by the failure of the people to govern themselves at the city, county and state level, and the demand of those people that the federal government intervene and attempt a solution of every problem, national or not. This attitude is well expressed by the saying, "Let George do it," instead of pitching in and solving our own and our community problems as they arise. The attitude Mr. Sumners referred to is a fundamental cleavage in personal and political philosophy between those who politically believe in a strong central government and those who believe in local self-government and states rights.

Decentralization of our government, if it were possible, would no doubt help cure the evils of bureaucracy. But we must be realistic and recognize that our federal government is no longer one of few and limited powers but has become as powerful as any in the world. Redistribution of any of this power back to the several states and to the people at home seems, at the moment, hardly feasible. However, Congress can, by a rearrangement of federal power, reestablish the checks and balances in our government and thus prevent the misuse of that power.

Definite Proposals Suggested to Streamline Congress

How could this be done? First, let Congress recapture its legislative power by the creation of its own Bureau of Legislation, under the immediate direction, supervision and control of Congress and its committees, to investigate and draft all subordinate rules and regulations needed to supplement any acts of Congress. Take out of the executive departments and administrative agencies all the people, or as many as may be needed, who are engaged in composing, writing and expertizing these minor laws. If ten thousand were necessary, that would probably be a very minor fraction of those now presumably engaged in those functions. There would be this additional advantage: That the bu-

reau, being under the direction, supervision and control of Congress and acting in its various divisions under the authority of Congressional committees, would have a legislative esprit de corps and a broad general outlook on these problems distinct from that of administrative bureaucrats intent on expanding their authority. Certainly the draftsmanship of all rules and regulations would become more uniform and more consistent with the spirit of our laws and institutions.

Second, create a system of minor federal courts. Take out of the departments and administrative agencies all employees necessary and qualified now exercising judicial functions and place them under the courts as masters, commissioners and examiners, to become a part of the judicial establishment with the outlook, impartiality, and esprit de corps of the judge. Localize them throughout the country in federal courthouses to be available for the prompt hearing of complaints involving the thousands of minor governmental regulations.

Consolidate the Various Federal Police Agencies

Third, create a department of federal police headed by a Cabinet member, placing in it all the necessary police officers, experts and investigators now scattered throughout all the departments and agencies. Let it be charged with the enforcement of all the federal laws, rules and regulations, just as our state and city police are charged with the enforcement of all state and local laws and regulations, instead of having, as now, one set of federal police to investigate violations of liquor laws, another for narcotic laws, another dealing with counterfeit money, another with stolen automobiles and interstate crimes, another to serve court process, and others to trail aliens illegally within the country, smugglers, or writers of letters obscene or deceptive, and a multitude of inspectors for a long list of agencies dealing with everything from boilers on ships or trains to bugs coming over the borders. We would immediately eliminate tremendous duplication of effort, to say nothing of the traveling and other expenses of the limited and special sleuths who now roam the country from one end to the other searching for violators of their particular little laws and regulations. Localize the offices throughout the country so that citizens concerned with the enforcement of the laws, as well as those who are being investigated, may know where, how and by whom the laws are being enforced. This would bring the federal power to the home locality where the citizen could represent himself or be represented by his home-town lawyer in his controversies with the federal government.

With their detective forces, their legislative powers, and their judges and magistrates stripped away and placed where they belong, the remaining functions of most of the agencies would be administrative; and we would then realize that such functions could well be performed by the great executive departments, with perhaps few and minor exceptions. One such change, urgently needed, is to put all the lawyers now engaged in agency enforcement work back under the supervision of the federal district attorneys and the Department of Justice.

Government Would Change to Spirit Envisioned by Founders

Slowly at first, then with ever-increasing momentum, our form of government would change back to the spirit, if not to the size and shape, envisioned by the founders. There would still be blocs and groups seeking regulation of their competitors and favors for themselves; but the laws, if enacted, would be written by the legislators or under their immediate control and supervision. The execution of the laws would be aided by an even-handed investigation and presentation of alleged violations. Most important of all, the accused citizen would have his day in court, in his own vicinity, before trained and impartial members of the judicial establishment.

Re-Strengthen Foundations—Preserve Superstructure

We have the greatest nation in the world, the best labor, the best management, the best inventors and scientists, the greatest production, the highest standard of living, the most liberty, the finest administration of justice. We know the form of government under which these gains were made. Let us re-strengthen the foundations while we preserve and magnify the superstructure of that government. Let us rededicate ourselves to the cause of justice and liberty, and of their essence, reason. Let us accept the full responsibility of our position as lawyers and citizens. Then may we face the future with full confidence that we shall preserve the gains for which our forefathers fought and died, for they left us the noblest heritage that ever fell to the lot of man: a land rich in natural resources, rich in history, and rich in the form of government by and through which the people rule. Let us look with assurance down the corridors of Time and envision the great nation of that day, with a material magnificence beyond our conception, with a people worthy of the sacrifices of their ancestors, and with a government based upon reason and the consent of the governed, opposed to force in whatever form it may manifest itself and true to the ancient American ideal of liberty under law. Then may we say with Rousseau: "These wonders are the work of law. It is to law alone that men owe justice and liberty."

THE TREATY TO PREVENT WAR

(Continued from page 62)

to the full limit necessary to make our action effective.

Our real problems relate to the terms of the treaty and the obligations the nation is willing to assume. Once they are settled, our Constitution places no obstacles in the way of prompt and efficient action by the United States.

Water Administration Under the Proposed Treaty with Mexico

by Jean S. Breitenstein
ATTORNEY FOR THE COLORADO WATER CONSERVATION BOARD

The House of Delegates adopted on September 12, 1944 (30 A.B.A.J. 661) resolutions recommended by the Committee on Administrative Law, as to certain aspects of the pending Treaty with Mexico. Debate on the Resolutions was reported in 30 A.B.A.J. 647-48, 660-665. The Resolutions were opposed in the House of Delegates by Delegates from the Basin States. In the interests of presenting both sides, Mr. Jean Breitenstein, Attorney for the Colorado Water Conservation Board, was invited by the JOURNAL *to give the arguments for the Treaty, as to the matters criticized by the House Resolutions. The action of the House was discussed editorially at 30 A.B.A.J. 629, where it was made clear that the Association is not opposing the Treaty as such but is asking its amendment as to the administrative law feature. Hearings as to the Treaty were begun on January 22, before the Senate Committee on Foreign Affairs.*

The economic life and the future development of over 330,000 square miles of land located in eight states are dependent upon the utilization of the waters of two international streams, the Colorado River and the Rio Grande. For many years these rivers have presented to the United States and Mexico vexatious problems of water conservation and flood protection. The Rio Grande forms the international boundary for over 1,200 miles. The Colorado River is the international boundary for twenty miles and then flows for a short distance through Mexico before entering the Gulf of California. Until the rights of each nation to the use of the waters of these two streams are defined, there can be no firm basis for the planning, construction and operation of water-use projects dependent upon their flows. This international situation must be handled by treaty unless the United States completely reverses its foreign policy.

There is now pending before the Senate Foreign Relations Committee a treaty which was recently signed after years of investigation and negotiation.[1] Its purpose is to define the rights of each nation and provide a method of administration. On the questions of the desirability of making the treaty now and of the equity of the division of the water, it suffices that the responsible officials believe that it is advantageous now to settle for all time the respective rights and that the division of water is eminently fair. The method of administration will be discussed since the treaty provisions in that regard have provoked argument.

Some means has to be provided for enforcing the treaty. Nature does not distribute water in accordance with man-made law. Administration of the treaty provisions must not be confused with administration of the stream flows which are within the defined share of each nation. Moreover administration of the limitrophe sections of the streams and the works located thereon must not be confused with the administration necessary in each nation to assure compliance with treaty provisions.

A pattern was established fifty-five years ago for the handling of such a situation. The Convention of 1889 between the United States and Mexico created the International Boundary Commission which is divided into a United States Section and a Mexican Section, at the head of each of which is an Engineer Commissioner. The Commission handles border affairs which require joint action. Each Section operates within the interior of its own country to enforce treaty provisions. The arrangement has satisfied each nation. Among other things the Commission has administered the Convention of 1906[2], apportioning the waters of the Upper Rio Grande. The pending treaty adopts this existing agency and enlarges its powers to permit effective enforcement.

The Commission is entirely a creature of treaty without any general authority. The powers of each Section may be amplified, as in the past, by national legislation. The

1. See Senate Documents Executive A and Executive H, 78th Congress, 2nd Session.
2. 34 Stat. 2953.

United States Commissioner and each member of the United States Section receive and hold office in accordance with the laws of the United States and are responsible to the Department of State, which on many matters must agree with the Mexican Ministry of Foreign Relations before action is possible and which, by Article 25 of the treaty, has the right to veto any decision of the Commission. Congress provides all funds for the maintenance of the United States Commissioner and the United States Section and for the investigation, construction, operation, and maintenance of all works in which the treaty provides for United States participation. If Congress disapproves of any proposed project, all it has to do to defeat that project is to deny the necessary funds.

The jurisdiction of the Commission is expressly defined as extending only to the limitrophe stream sections, the land boundary, and the works located upon the common boundary.[3] The Commission, as such, has no jurisdiction within the interior of either nation.

Each Section has jurisdiction over works constructed, acquired or used exclusively in fulfillment of treaty provisions and located wholly within the territory of its country. Works located within either country and used only partly for the performance of treaty provisions remain under the jurisdiction of the agencies of that country authorized by domestic law to operate and maintain such works.[4]

Neither the Commission, the United States Commissioner, nor the United States Section has any power over the administration of water within the United States. That is governed entirely by domestic law. What the treaty does is to define the share of each nation. Domestic law will continue to control the distribution of stream flows in the same manner, to the same extent and with the same effect as before the treaty was executed. Of this there can be no doubt. The situation is comparable to the division of the flow of an interstate stream within this country. Each state of our Union is entitled only to its equitable apportionment of the benefits of the flow of an interstate stream[5] and, when such apportionment has been made either by interstate compact or by decision of the United States Supreme Court, then state law applies to govern local distribution. This was determined in *Hinderlider* v. *La Plata.*, 304 U. S. 92, wherein the Court considered the effect of a compact between Colorado and New Mexico apportioning the waters of the La Plata River. At a time of low water Colorado officials, as permitted by the compact, agreed with New Mexico officials to rotate the flow between the states. A Colorado ditch company demanded water when there was sufficient flow to satisfy its right, except for the compact and rotation agreement. The demand was rejected, and suit brought to compel delivery. The Court in denying relief held that the compact defined the share of each state and state law applied to distribute such defined share. Since a water user in one state can acquire no property right to water which by a compact is within the share of the other state, the Colorado water user had no right to the water which it demanded and which by the compact belonged to New Mexico.

These principles are directly applicable to the pending water treaty. If the flow of the international streams is so deficient that any United States water user will be deprived of water, that result will occur solely because of an infirmity of his right under local law. It will not be caused by any decision made by the Commission, the United States Commissioner or the United States Section. It will result from the application of domestic law upon rights acquired under domestic law for the use of the United States' share of the stream flow.

Since the Colorado River is the controversial stream, it is pertinent to refer to what might be called the law of that river. By the Colorado River Compact[6] the states divided the water between the Upper and Lower Basins and agreed that upon the recognition of a right in Mexico to Colorado River water such right shall be satisfied first out of surplus[7] and then equally out of the share of each basin. Thus the states have voluntarily agreed to the position any Mexican right may have in relation to rights within the United States. For example, a United States right which must be satisfied out of surplus under ultimate conditions of development will be junior to the Mexican right. This results not from the treaty but rather from the compact.

State law governs the distribution of the share of each state but the determination of that share of each state in the Lower Basin is affected by the Boulder Canyon Project Act[8] under which Boulder Dam was constructed. By its terms California was required to pass, and has passed, a statute[9] limiting its rights to Colorado River water and the Secretary of Interior was authorized to contract for the use of water impounded by Boulder Dam, subject to the availability of that water under the Compact. Pursuant thereto the Secretary has contracted with California interests and with the States of Arizona and Nevada. The Compact, pertinent state statutes, the Project Act, the California Self-Limitation Act and the contracts with the Secretary of the Interior remain the law of the river. The ratification of the treaty merely makes certain the portion of

3. See fifth paragraph of Article 2 of treaty.

4. Whatever doubt there may have been on this point because of the wording of Articles 2 and 23 of the treaty was clarified by a Protocol signed November 14, 1944. (See Senate Document Executive H, 78th Congress, 2nd Session).

5. *Wyoming* v. *Colorado*, 259 U.S. 419; *Connecticut* v. *Massachusetts*, 282 U.S. 660; *New Jersey* v. *New York*, 283 U.S. 336; *Washington* v. *Oregon*, 297 U.S. 517; *Colorado* v. *Kansas*, 320 U.S. 383.

6. House Document No. 605, 67th Congress, 4th Session.

7. Surplus as defined by Compact, paragraph III (c), is water above the aggregate of the quantities specified in paragraphs III (a) and III (b). For practical purposes it is available water in excess of 16,000,000 acre-feet per annum.

8. 45 Stat. 1057, 43 U.S.C.A. 617-617u.

9. California Stat. 1929, Chapter 16, page 38.

the stream flow upon which they will operate.

Along the lower Colorado the United States has constructed Boulder Dam, Parker Dam, Imperial Dam and the All-American Canal. Davis Dam has been authorized for construction.[10] Each of these structures is constructed and operated by the Bureau of Reclamation. The treaty will not change such operation. Until Congress legislates otherwise, the Bureau of Reclamation remains in control. The obligation of the United States to deliver water to Mexico will be satisfied by placing water release orders with the operators of Davis Dam, Imperial Dam and the Imperial Dam-Pilot-Knob section of the All-American Canal. If these water release orders are valid under the treaty, the Bureau of Reclamation must recognize them, otherwise not. Any individual believing such orders are improper most certainly has the right to assert and litigate his claim in a court of the United States.

Perpetual duration of the treaty is desirable since the purpose is to define for all time the rights of the two nations and by so doing to permit firm development of water-use projects. If these rights were subject to change at the caprice of either nation, then the purpose of the treaty would fail of achievement. Any provision for termination must be mutual.

Summarizing, executive control is afforded by the supervisory authority of the Department of State. Legislative control is provided by Congressional authority over the granting of necessary funds and by the retention of jurisdiction of local authorities over the distribution of the defined share of the United States. Judicial control over acts of the International Commission within its granted authority is impossible because of the non-existence of an appropriate international tribunal. Acts of the United States Commissioner and the United States Section in excess of jurisdiction are reviewable and controllable by the courts. Vested property rights can be condemned only in the usual manner. Water rights within the interior of the United States remain under the jurisdiction of the local authorities whose actions are subject to the customary judicial controls.

The responsible officials and a great majority of the affected water users of six[11] of the eight states directly affected by the treaty are actively supporting its ratification. They believe that it is desirable and fair and that its enforcement is entrusted to a tested and experienced body and is so circumscribed that the orderly American principles of constitutional government apply.

10. Under Article 12 of the treaty the United States agrees to construct Davis Dam. Davis Dam was authorized by Congress for construction before the pending treaty was negotiated. At the time of its authorization the statement was made that one of its functions would be to provide the fine degree of control needed to meter out water in accordance with any treaty or agreement that might be made with Mexico. See House Document 186, 77th Congress, 1st Session.

11. The six states are Arizona, Colorado, New Mexico, Texas, Utah and Wyoming. Opposition to the treaty comes from California and Nevada.

Reply by Dean Roscoe Pound

Dean Roscoe Pound presented before the House of Delegates on September 11, 1944, his reasons for urging amendment of the proposed Treaty with Mexico, insofar as it would create an administrative agency as to properties and internal affairs within the United States, without provision for control of the agency by the Congress, for judicial review, or for termination of the agency without the consent of both parties to the Treaty. (See 30 A.B.A.J. 660-661). In his present article Dean Pound does not repeat those arguments, and replies only to what he regards as new contentions urged by Mr. Breitenstein.

What was said before the House of Delegates as to the objections to certain provisions of the Treaty which led to the action of the House is not met by this article. We are told that the Treaty adopts an "existing agency and *enlarges its powers to permit effective enforcement.*" It is the enormous and unprecedented enlargement to which objection is made.

Next we are told that the United States Commissioner is responsible to the Secretary of State. This is said to be by virtue of Article 25 of the Treaty. But Article 25 has to do with the action of the Commission as a whole, and what is to happen if either government disapproves some action thereof. What the Committee on Administrative Law objected to was the unrestricted powers of the American Commissioner acting as a section of the whole Commission as to matters on the American side of the line. Article 25 has no application here. As to this we are told that "if Congress disapproves of any proposed project, all it has to do to defeat that project is to deny the necessary funds." But the American Commissioner has powers of interpreting the Treaty and of implementing its provisions which do not require any appropriation from Congress. There is no real check as to the powers which we discussed before the House of Delegates. If failure of Congress to make appropriations could operate as a check it could only so operate after mischief had happened even if effective then.

Next there is an elaborate argument as to the general water law, the law applicable to interstate rivers, and the state laws. All this is quite outside of the point. Domestic law in conflict with the Treaty would simply be abrogated by it. The Treaty itself as such would be the

(Continued on page 111)

Rules of Criminal Procedure Approved by Supreme Court

The Advisory Committee appointed by the Supreme Court to draft rules of criminal procedure for the district courts of the United States announced today that the rules which it had prepared and which, with certain modifications, were approved and prescribed by the Supreme Court, were reported to the Congress January 3.

These rules were formulated pursuant to an Act of Congress of June 29, 1940, which authorized the Supreme Court to prescribe rules of practice, pleading and procedure for the district courts of the United States for the trial of criminal cases.

The Act also provides that the rules prescribed thereunder shall not take effect until they shall have been reported to the Congress by the Attorney General at the beginning of a regular session thereof and until after the close of that session. Pursuant to this requirement the rules were transmitted by the Supreme Court to the Attorney General and are being reported by him to the Congress today, at the beginning of the first regular session of the Seventy-ninth Congress.

The rules have been prepared in the following manner:

On February 3, 1941, the Supreme Court appointed an Advisory Committee, to serve without compensation, to draft rules of criminal procedure. The Committee conducted research and studies. The Committee held a number of meetings, each lasting several days, and in addition it operated through subcommittees. Federal courts throughout the country, as well as bar associations, appointed local committees of the Bar to make suggestions to and cooperate with the Supreme Court's Advisory Committee. In May, 1943, the Advisory Committee published a preliminary draft of proposed rules, which were circulated among members of the bench and bar throughout the country, the various cooperating committees, and others, for criticisms and suggestions. The subject was considered at Judicial Conferences for various judicial circuits and at meetings of bar associations. The Committee then revised its preliminary draft in the light of the material thus obtained and a second preliminary draft was published and circulated in February, 1944, which was subjected to a similar process. The final draft was submitted by the Committee to the Court in July, 1944. After considering the report of the Advisory Committee, the Supreme Court took action on December 20, 1944, approving the rules submitted by the Advisory Committee, with a few modifications, and formally prescribed them and directed that they be submitted to the Congress.

The rules of criminal procedure regulate every stage of a criminal prosecution from the beginning to the end.

They deal first with preliminary proceedings: The filing of a complaint before a commissioner, the issuance of a warrant or a summons by him, and preliminary hearings before the commissioner.

The next chapter of the rules deals with indictments and informations. A simple form of indictment is introduced, for example, the simple form of indictment for murder in the first degree is only five lines long.

The next section of the rules deals with the proceedings between indictment and trial. Pleas in abatement, demurrers, motions to quash, and pleas in bar are abolished. All of these are highly technical and have been a source of delay. In their place there is substituted a simple motion to dismiss in which a defendant may join all of his preliminary objections, if he has any, thereby safeguarding all of his rights. All of such objections must be joined in a single motion.

The next section of the rules deals with procedure at the trial.

The rules contain an express safeguard of the defendant's right of counsel and provide that if he appears in court without counsel and is unable to procure a lawyer to defend him, the court shall advise him of his right to counsel and shall assign counsel to represent him, unless he elects to proceed without counsel.

The regulation of judicial procedure by rules of court instead of by Acts of Congress or State Legislatures has been an objective of bar associations for a great many years and is an outstanding and far-reaching reform in the law.

Mr. Justice Black stated that he does not approve of the adoption of the rules. Mr. Justice Frankfurter does not join in the Court's action for reasons stated in a memorandum opinion.

The Legislative Standards of the Renegotiation Statutes

by G. E. Rosden
OF THE DISTRICT OF COLUMBIA BAR

The original renegotiation statute of April 28, 1942,[1] did not give any definition or standard for "excessive profit"; it merely says that the term "renegotiate" shall include the refixing of the "contract price". The first definition was introduced by the amendment of October 21, 1942[2] in Section 403 (4) as follows:

> The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

The amendment of February 25, 1944, by Section 701 (b) of the Revenue Act of 1943,[3] changed Section 403 (a) (4) (A) as follows:

> (i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities and manpower;
> (ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;
> (iii) amount and source of public and private capital employed and net worth;
> (iv) extent of risk assumed, including the risk incident to reasonable pricing policies;
> (v) nature and extent of contribution to the war effort, including inventive and development contribution and cooperation with the Government and other contractors in supplying technical assistance;
> (vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;
> (vii) such other factors the consideration of which the public interest and fair equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

The question whether either of these standards is sufficiently clear so as to meet the test of constitutionality is one of the most controversial problems in the field of renegotiation. Congress cannot delegate its primary legislative power. This principle is based on several grounds: It is based on the principle *delegatus non potest delegare* as well as on Article I, Section 1, of the Constitution.[4]

The requirement of "standards" is looked upon with varying degrees of strictness according to the subject matter of the legislation.[5] It, therefore, is necessary to determine what kind of legislation the renegotiation statutes represent.

There are three possibilities:

1. Renegotiation statutes might be considered as taxing statutes.
2. Renegotiation statutes might be considered as statutes of administrative guidance.
3. Renegotiation statutes might be considered as statutes in exercise of war power.

It has been propounded that our renegotiation statutes are taxing statutes.[6] Little can be found to support this position.[7] Although the legislative history contains a reference giving the avoidance of excessive costs of war as a reason,[8] the far greater and more important part of legislative history[9] and legal opinion[10] contends that the statute became necessary in order to uphold the morale of the people which was in danger of being shaken by reports of war profiteering.[11] Arguments to the contrary are not likely to be suc-

1. Public Law No. 528, 77th Congress, 2nd Session; 56 Stat. 245.
2. Public Law No. 753, 77th Congress, 2nd Session; 56 Stat. 982.
3. Public Law No. 235, 78th Congress, 2nd Session.
4. "All legislative power herein granted shall be vested in a Congress of the United states." See 11 Am. Jur. 923, and 49 L. ed. 476. cf. Pound spurious interpretation (1907), 7 *Columbia L. R.* 379 (384).
5. So, for instance, is a grant of power to tax disfavored. See Sutherland, *Statutory Construction*, Horack's 3rd Ed. (1943) Secs. 320 and 6705. Also in re *Laundry License* case, 22 Fed. 701.
6. Burling, Renegotiation—"The Myth of Repricing," 11 *Univ. of Chicago L. R.* 222 (226). Withrow, "The Control of War Profits in the United States and Canada," 91 *Univ. of Pa. L. R.* 194 (214).
7. Senator George in Legislative Materials, Renegotiation of War Contracts, Legislative Materials prepared for the Committee on Ways and Means, by Barron K. Grier, 78th Cong. 1st Sess. p. 12. (This paper is hereafter referred to as "Legislative Materials,") p. 63. Senator Clark in Legislative Materials, p. 135.
8. *Ibid* p. 12; also Repr. Voorhis, p. 102.
9. See particularly hearings before Committee on Ways and Means on H.R. 2324, 2698 and 3015, 78th Cong. 1st Sess., p. 840. Also Repr. Shipstead in Legislative Materials, p. 13.
10. G. F. James, 11 *Univ. of Chicago L. R.* 204:
"Statutory renegotiation rests upon one foundation: The demand of the public conscience that no man shall gain from the common calamity of war."
See Senator Walsh in 11 *Univ. of Chicago L. R.* 191; Steadman, "Legal Aspects of Renegotiation," 42 *Univ. of Mich. L. R.* 545 (553).
11. D. Fain and R. F. Watt, 94 *Columbia L. R.* 127 (142, 1943) find the primary cause in the prevention of inflation.

cessful in the face of this legislative history.

It has been contended that the statute is one of administrative guidance.[12] A statute of administrative guidance is in the nature of an order by the principal (Congress) to the agent (procurement officers)[13] to proceed with his activities under observance of the principles and directions laid down by such statute. It is clear that just as a principal may frame his own directions to his agent, so Congress may frame its directions to its agents without the observance of particular standards. No doubt, the renegotiation statutes *are statutes of administrative guidance* particularly in so far as they instruct procurement officers to insert renegotiation clauses in all their contracts.[14]

A Statute in Exercise of the War Power

But renegotiation statutes are not solely statutes of administrative guidance. *They are more than that,* for they intend to go further than just giving instructions to procurement officers: They go as far as to subject parties to renegotiation who are not in privity, namely subcontractors.

The statute, consequently, is *also a statute in exercise of the war power.* Congress has the power to wage war[15] and it has always been considered within the powers of Congress to pass all laws which are necessary for the prosecution of a war.[16] This power is derived from Article 1, Section 8, of the Constitution.

However, the existence of an emergency does not abolish our constitutional safeguards.[17] If, therefore, we admit the power of the Federal Government to enact legislation for the prosecution of the war and if we further admit that the preservation of the national morale is necessary for such prosecution of the war,[18] it is also clear from judicial precedent[19] that such legislation must be in accordance with the Constitution. In particular, the requirement for setting legislative standards must be observed.

The requirement of "standards" has been the subject of many controversies. Under the old common law when no separation of powers existed, the problem did not arise.[20] The doctrine of separation of powers as propounded by Montesquieu and Blackstone excluded any delegation of legislative power. But when the tasks of government became more comprehensive, it was a natural consequence that the determination of facts upon which the expressed legislative will was to become effective had to be left to administrative bodies. In other words, administrative bodies determined facts and if this determination of facts coincided with the facts upon which the legislature imposed legal consequences, the administrative body took action accordingly.[21] Later the complexity of modern life made it impracticable to deal with every single contingency in statutes. Consequently, the legislature became less specific and left the power to make rules in the hands of administrative bodies. This led to the concept of laying down "primary standards"[22] or "legislative policy", leaving it to administrative bodies to "fill in the details."[23] Then started attempts to lay down this legislative policy in sweeping words with the excuse that it was necessary to do so in order to discharge the duties of the legislature in a practicable way. Some writers agreed with such procedure.[24] But the courts have never consented to such a dangerous doctrine without an express qualification according to which the statute must circumscribe standards or the legislative policy. As Justice Cardozo put it in *Standard Chemical* v. *Wough:*[25]

> It (the law-making body) delegates not the power to initiate but the power to put into effect.

and later:

> He (the President) has been authorized to give effect by regulation and order to the standard in the mind of Congress. The unknowable must remain unknown even to chiefs of states.

Justice Cardozo required that the mind of Congress be made known in the statute beyond doubt. The Supreme Court of the United States has consistently held that it is necessary for the legislature to lay down a legislative standard or policy which is definite and precise enough to circumscribe what is forbidden and what is allowed.[26] Even the latest decision of the Supreme Court of the United States does not propose to transgress this requirement. In *Yakus* v. *United States,*[27] the case of delegation of powers most recently decided by the Court, the requirement is stated as follows:

12. Insofar as a statute imposes duties upon procurement officers or departments and does no more, there is room for wide discretion.

13. Procurement officers are agents of the government. *Curtis* v. *United States,* 2 Ct. Cl. 144.

14. See Charles S. Collier in *Law and Contemporary Problems,* Vol. X, p. 630 (1943).

15. *Highland* v. *Russel,* 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314. *Ruppert* v. *Caffey,* 251 U. S. 264, 64 L. ed. 260, 40 S. Ct. 141. *Pappens* v. *United States,* 252 Fed. 55.

16. *United States* v. *Cohen,* 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298. *Stewart* v. *Kahn,* 78 U. S. 493, 11 Wall. 493, 20 L. ed. 176. *Miller* v. *U. S.,* 78 U. S. 268, 11 Wall. 268, 20 L. ed. 135. *Ex parte Mulligan,* 4 Wall. 2. *Pappens* v. *United States, supra.*

17. *Hamilton* v. *Kentucky,* 251 U. S. 146. "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."

18. The criterion is reasonable necessity for such legislation. Determination must be made by balancing the importance of the public benefit against the seriousness of the infringement of vested rights. *(Dederick* v. *Smith,* 88 N. H. 63, appeal dismissed, 299 U. S. 506, 81 L. ed. 375) See also *Carolina Products* v. *Evaporated Milk Assn.,* 93 F. 2d, 202, and 16 C. J. S. 602.

19. *United States* v. *Cohen Grocery, supra, Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106. *United States* v. *Bernstein,* 267 Fed. 295.

20. Sharp, "The Classical American Doctrine of the Separation of Powers," 2 *Univ. of Chicago L. R.* 385 (1935).

21. Brig *Aurora* v. *United States,* 7 Cranch 382, 3 L. ed. 378 (1813).

22. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 85 L. ed. 624, 61 S. Ct. 524. *United States* v. *Grimaud,* 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480 (1911). *Buttfield* v. *Stranahan,* 192 U. S. 470, 48 L. ed. 525, 24 S. Ct. 349 (1904).

23. *United States* v. *Shreveport Grain,* 287 U. S. 77, 77 L. ed. 175, 58 S. Ct. 42 (1932). *Pacific* v. *White,* 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159.

24. Wickersham, in 35 *Harvard L. R.,* 952, and 31 *Mich. L. R.,* 786.

25. 231 N. Y. 51.

26. *United States* v. *Cohen Grocery, supra.* Well worded in *People ex rel. Rice* v. *Wilson,* 364 Ill. 406, 4 N. E. 2d 847. See also *Schechter* v. *United States, supra,* and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241.

27. 320 U. S. 730, 88 L. ed. 653; 64 S. Ct. 190.

> The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . . These essentials are preserved when Congress has specified the basic conditions of fact, upon whose existence or occurrence, ascertained from relevant data by designated administrative agencies, it directs that its statutory command shall be effective.

and later:

> Only if we could say that there is an absence of standards for the guidance for the administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . .

and still further:

> The standards prescribed by the present Act with the aid of the "statement of considerations" required to be made by the administrator, are sufficiently definite and precise to enable Congress, the courts and the public, to ascertain whether the administrator . . . has conformed to those standards.

The implication from this language is clear: Congress must prescribe standards and they must be definite and precise enough to insure enforcement within limits discernible by Congress, the courts and the public alike.

A. *The October Statute*

Since the original statute governs renegotiations for fiscal years ending on or before June 30, 1943,[28] it is necessary to examine it for sufficiency of standards.

As mentioned before, Section 403 (4) gave the following definition:

> The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profit.

In other words, the term "excessive profits" is defined to be what the renegotiators declare to be excessive profits. Does this represent a standard consistent with the requirements as they are laid down by the Supreme Court of the United States?

The only term known to the law which approximates the term "excessive profits" is the term "excess profits" as used in the Excess Profits Act.[29] It can be seen from the legislative history of the Act that the two terms clearly are not intended to connote the same thing.[30] We have to ask, therefore, when profits reach the imaginary line of demarcation that makes them "excessive".

It has been said that this is a standard of reasonableness. That would mean that reasonable profits should be determined and that everything in excess of reasonable profits would be designated as "excessive profits". It would mean that excessive profits are that portion of the profits that is in excess of reasonable profits.

No Standard of Reasonableness

But there is no indication in the statute whatsoever indicating that excessive profits are those profits which exceed a general measure of reasonableness. In fact, the principles developed by the administrative agencies,[32] as well as the standards written into the law by the amendment of February 25, 1944, show very definitely that that is not the yardstick. The efficiency of a contractor, for instance, stands outside of all considerations which determine reasonableness of profit. So does the nature and extent of the contribution to the war effort.[33] Furthermore, the fact that excessive profits are to be determined before taxes and without regard to taxes may lead and has frequently led to the result that the contractor retains only 1½% or 2% profit, which is certainly below the standard of reasonableness, if not confiscatory.

The legislative history also gives strong indications that we are not dealing with a standard of reasonableness. So, for instance, did Representative Jonkman say on the floor of the House:[34]

> Excessive profits refers to marginal profit on articles which are priced too high and amounts to actual or constructive fraud or gouging of the Government.

This seems to indicate not a standard of reasonableness but one of gouging.

On the other hand, a multitude of legislative history references indicate an understanding on the part of members of Congress that the criterion should be one of "unconscionableness".[35]

It is patently clear that the standard, which was to govern the determination of excessive profits according to the first renegotiation statute, was very hazy in the minds of the legislators; so much so, in fact, that it is impossible to determine what was in the mind of Congress as a whole.

We do not see how a standard of reasonableness could have been intended. But even if such was the intention, the *Schechter* case[36] offered a similar problem. In that case, a standard of "fair competition" was set up. Although the Court was aware of the fact that the common law knew a standard of "unfair competition", this standard could not be applied reversely because additions were intended to be made to this common law standard.

But even if we were dealing with a standard of reasonableness, judicial precedent would still rule out the acceptance of such a standard in this case. For in *United States* v. *Cohen Grocery*,[37] the Supreme Court said:

> The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, "That it is hereby made

28. Sec. 403 (c) (6).
29. See 710-783 of the Internal Revenue Code.
30. See also Sharp, 11 *Univ. of Chicago L. R.*, 271 (282).
31. Steadman, *supra*, p. 566. Repr. Patman, Legislative Materials p. 226.
32. Particularly Procurement Regulation 12, which regulates not only control of profit but also control of costs.
33. What is a "reasonable profit" in the true sense would have to be determined solely from the point of view of the producer. Contribution to the war effort, as well as efficiency, as much as they entitled the producer to a reward in the interest of public policy, are inherently extraneous to a standard of a "reasonable profit." They are super-added criteria.
34. Record of Nov. 24, 1943, House of Representatives, Vol. 84, p. 10046.
35. Senator McKellar in Legislative Materials p. 59. (Apr. 7, 1942). Repr. Cannon in Legislative Materials p. 88. (April 21, 1942). Repr. Ditter in Legislative Materials p. 100. (April 21, 1942).
36. *Supra*.
37. *Supra*.

> unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

It may be said that this decision refers to a criminal statute and that, therefore, the requirements for standards had to be stricter than for a civil statute.[38] The same statute, however, was also held unconstitutional with regard to civil cases in a decision handed down by Justice Cardozo in the case of *Standard Chemicals* v. *Wough*,[39] in which he said:

> I do not overlook the fact that the Court there (in the *Cohen Grocery* case) was dealing with a criminal prosecution. The ground on which it based its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because it was too vague to be intelligent. No standard of duty had been established. No test had been supplied, as where statutes direct adherence to reasonable or market values or to rates fixed by a commission or other legislative agency. There was merely the denunciation of "acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and the jury." The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecution. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all, it is merely exhortation and entreaty. . . . it sets the individual adrift upon the unchartered sea of subjective prejudice and favor.

Efficient Standards Are Lacking

We conclude that the term "excessive profits" does not constitute an acceptable standard even under the latest decisions of the Supreme Court.

This result is not only the inescapable consequence of judicial precedent, it is also a result that seems to have been in the minds of many members of Congress. In the discussions on the floor of Congress,[40] Senator Taft said:[41]

> . . . rather a complete delegation of power which Congress ought to exercise over practically the entire business of the United States.

and later:[42]

> There is not the faintest suggestion of a yardstick for excessive profits.

Senator Walsh[43] also declared that there was no yardstick. Senator Overton[44] also found any yardstick missing.

Senator White declared:[45]

> What it would do would be to deny a citizen of the United States the right to go into court and seek to recover what a Secretary might have determined, without any standard whatsoever, to be an unjust profit. In other words, without any standard laid down in the bill. . . .

So said Senator Danaher:[46]

> There should be some regulations, some directions, some standards prescribed by which there will be some uniformity of operation.

Representative Gearhart said[47] on occasion of a discussion later:

> I am against renegotiation because I am quite convinced that the proposed statute is unconstitutional. All will agree, I am quite sure, that it is unconstitutional for Congress to delegate its legislative prerogative.

Representative Church said:[48]

> (it) suspends—even abrogates—constitutional rights.

and in the opinion of Representative O'Connor:[49]

> There is no standard provided in the language whereby excessive profits may be determined. What one person may think is excess profit may appear to another person to be reasonable. In other words, we are delegating the power vested in the Congress of the United States by the Constitution to three different Departments to carry out. That is not the proper thing to do.

See further Representative Vinson:[50]

> (such a bill) must establish fair and reasonable standards for the assurance of the contractor and the guidance of the department head. None of the proposals before the House today meet these requirements.

Finally, Representative Disney, in reporting an amendment to the House and speaking for the Committee on Ways and Means,[51] gave the following reason for the selection of the Tax Court as a specialized forum to handle appeals in renegotiation cases:

> . . . 4. That a forum had to be chosen upon which Congress could impose the duty of deciding the non-judicial question as to the amount of excessive profits, for the Committee is aware that the standards it has prescribed for the determination of excessive profits are too general and flexible to be applied judicially. Under the amendments recommended by the Committee, these standards would not have to be applied judicially since the obligation to refund excessive profits is made in all cases a contract obligation of the contractor.

It is remarkable that the Congressional Record shows that seldom

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38. See Steadman, *supra*.
39. *Supra*.
40. The legislative history references are taken from proceedings before the original statute was passed as well as from proceedings which led to amendments.
41. Legislative Materials, *supra*, p. 137.
42. *Ibid.*, p. 138.
43. *Ibid.*, p. 127, 148 and 151.
44. *Ibid.*, p. 127. See also Senator Hayden, p. 131.
45. *Ibid.*, p. 75.
46. *Ibid.*, p. 74.
47. Cong. Record of Nov. 24, 1943, Vol. 89, p. 10048.
48. *Ibid.*, p. 10049.
49. Legislative Materials, *supra*, p. 95.
50. *Ibid.*, p. 92.
51. Cong. Record of Nov. 30, 1943, Vol. 89, p. 10250.

It must be observed that this was said not in regard to the "standard" of the October statute but in regard to the amendment of Feb. 25, 1944, which purported to establish standards. If even these standards were considered incapable of judicial application, how much less so was the "standard" of the October Act.

"Books for Lawyers"

YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY—*By Catherine Drinker Bowen. 1944. Boston: Little Brown and Company. $3.00. 419 pages with appendices and index.*

This book began as a labor of love and ended as a best-seller.

The story refuses to be reviewed in the conventional manner of making notes and selecting quotations which will help the reader to decide whether the book would be of interest and value to him. It is replete with stimulating facts and observations. I find I have marked 103 places to be cited. That is too many. The government restricts the paper the JOURNAL can use. So let us try another approach.

Every lawyer wishes he could be more like Holmes in his understanding of the law and in his ability to express it.

A man, by taking thought, can not add a cubit to his stature. But he can add to his experience of life. "The life of the law has not been logic; it has been experience."

We cannot all be descendants of so great a family. Not every man's father can dash off the poem "Old Ironsides" and be The Autocrat of the Breakfast Table. Not every man is blessed to meet and marry so lovely a woman as Fanny Dixwell.

Yet there is a lot of encouragement for us mortals.

The Justice unquestionably learned his inductive method of reasoning from his father who felt: "Why could not the doctors recount what they *saw* in the hospitals, what they felt with their hands, and smelled with their noses, rather than what some long-dead medico had thought about?" When Dr. Morton conferred the blessing of ether on mankind, it was Dr. Holmes who supplied the adjective—Anaesthetic.

The Justice and his father were always antipathetic. Possibly because the genial doctor had first studied law and had conceived an absolute hatred for it.

As to writing, Holmes told William James "writing is so unnatural to me." And he failed to grasp the tremendous diction of Lincoln's Address at Gettysburg.

As to liquor, the report is: "Whiskey had kept him from dying of cramps, whiskey had kept his feet dry and his bowels from taking away all the blood in him."

About women he was just plain dumb. Everybody in Cambridge knew that Fanny and Oliver were passionately in love—that is, everybody but Oliver himself. His Uncle John gave him a verbal lashing which woke him up. Because he was tall, broad-shouldered and handsome, women were attracted to him. Fanny was jealous. "Her tongue was quick and she used it." Then she asked herself: "Was ever man so invincibly innocent?" The answer was yes. Her last words, spoken to her maid Mary, were: "Tell him I loved him."

As a practitioner, Holmes attracted few clients. Yet there later came to him the greatest client in the world—the United States of America, to whom (having no children) he bequeathed his estate. He was the keeper of the conscience of the nation.

He was not ashamed to cry. Fort Sumter was bombarded April 12, 1861. He enlisted April 24 while still an undergraduate. He was able to attend commencement. At the end "Wendell got a rose and flung it across to Fanny . . . and was amazed to find himself weeping."

I have not dwelt on the grandeur of Holmes because you all know it and no reviewer can embellish it. I have sought rather to dwell on those aspects which make him seem much more akin to us. Earlier, I ventured to say that a man, by taking thought, can add to his knowledge. Here is a curious parallel.

While Holmes was at college, Emerson gave him a copy of Plato, saying "Plato has pleased the world for two thousand years. Now let's see if he can please you." After Holmes reached ninety years of age, he was rereading the same book when the newly inaugurated President, Franklin D. Roosevelt, came to call. The dialogue was:

"Why do you read Plato, Mr. Justice?"

"To improve my mind, Mr. President."

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Before reading the book I wish each of you could approach it through the same prelude as was my privilege. I heard the Boston Symphony Orchestra play Tschaikowsky's Fifth Symphony. It has two motifs. Fate and Faith. In the music they are stated and then commingled just as they are in a man's life.

Fate! Holmes respected it because he had faced it. When he was buried at Arlington Cemetery, eight infantrymen fired three volleys:

Balls's Bluff . . . Antietam . . . Fredericksburg.

Three grievous wounds. Three bullets through his body, his abdomen and his throat. A half inch to the left and the wound would have been fatal. The loss to the whole nation would have been irreparable. Chance! Luck? "Were these stories true about great men? Did not luck have a lot to do with it?"

Faith! Holmes, like Lincoln, felt that this was something to keep and nurture within oneself.

"Time has upset many fighting faiths. The best test of truth is the power of the thought to get itself

accepted in the competition of the market."

"If there is any principle in the Constitution that more imperatively calls for attachment than any other it is the principle of free thought . . . . They believe more than some of us do in the teachings of The Sermon on the Mount."

"Faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it. . . . As I gazed, there shone the stars."

"If I were dying, my last words would be: Have faith and pursue the unknown end."

REGINALD HEBER SMITH

Boston, Mass.

CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS. *By Norman Hill. (January 25, 1945). New York and London: Oxford University Press, Inc. Pages vi, 248. With bibliography and index. ($3.00).* If this book were widely read by lawyers and laymen, it could be one of the land-marks along the road from the recurrence of wars to the point where foundations can be built for security and peace based on law and fair play.

It seems to merit such an appraisal because it is realistic, factual and clear in its insight and statement of the factors entering into the most difficult and disturbing of the problems of international relationships—the claims which are made for territory. Generalizations and "pious wishes" are rarely given place in this keen and constructive analysis by Norman Hill, Professor of International Law and Relations at the University of Nebraska.

Recognizing that "the relations between modern states reach their most critical stage in the form of problems relating to territory," the author traces the types of claims which have been prolific as causes for war and provocative as a part of the terms of peace. Territorial disputes in America and Europe, particularly those emerging at the Paris Peace Conference, receive major attention, both because they are well recorded and because they are typical of modern controversies which have led to armed conflict.

Such disputes as arise from claims of title in fact to a territory, according to evidence and accepted international law, are in a "legal" category and are susceptible of adjudication by a court as such. Professor Hill's work has great timeliness because of the clarity of its recognition and demonstration that the claims made to territory are preponderantly "non-legal", and that a modern development which may be significant of a trend toward some sense of accountability to the enlightened judgment of mankind is the elaborateness with which such claims have come to be stated and justified, whereas in earlier history "the more common practice was to seize coveted territory without bothering to justify the action".

One of the more persistent of current fallacies is that practically any dispute or rivalry between two nations could be determined and disposed of as a potential protest for aggression or armed conflict, referring the controversy to a *court*, even though there are as yet no established legal or evidentiary standards according to which the tribunal could act *judicially* and it would be functioning as an "umpire" or "referee" over rivalries or animosities, rather than as a law-governed court.

Professor Hill states clearly and illustrates specifically the types of "non-legal" claims which are made for territory—historical, geographic, strategic, ethnic, economic, sentimental, compensation for aid given in the war, and the like. Solutions and procedures for both the "legal" and the "non-legal" claims are discussed informatively, with the aid of the experience gained from the many disputes of this character. Arbitration and *ad hoc* tribunals, agencies such as the proposed Security Council, and the difficulties as to referrals, are pragmatically discussed.

The author points out that the Permanent Court of International Justice "was intended primarily to deal with legal disputes". Such "compulsory jurisdiction" as the Court is given under Article 36 of the Statute relates only to "legal disputes", and all of the territorial disputes before the Court are shown to have involved "legal" claims. Professor Hill suggests that the Court is empowered, under the Statute, to deal with claims of a "non-legal" nature, if the same are referred to it by the parties, and to determine such claims on the basis of "fair dealing and good faith", as Professor Hudson, now, a distinguished member of the Court, stated it in 1934. The book is replete with historical instances which show the difficulties, and the possible dangers, which are inherent in submitting contested territorial claims to a judicial determination, at least until there has been a great broadening and strengthening of international law, so that the World Court would be functioning in a judicial manner in hearing and deciding between the rival claims.

WHAT IS THE VERDICT? *By Fred L. Gross. (November 21, 1944) New York: The Macmillan Company. ($2.50). Pages 311.*

The law courts provide a seemingly inexhaustible fund of material for writers of all kinds—biographers, autobiographers, reformers, satirists, playwrights, fictionists, humorists.

As I glance at my library shelves I see witnesses by the score. *Jarndyce* v. *Jarndyce* and *Bardell* v. *Pickwick* are leading cases, as frequently referred to as any in the reports. *Ten Thousand a Year* was published more than a century ago, but Tittlebat Titmouse continues to be introduced to every young lawyer who comes to the Bar: Mr. Tutt defies all efforts of his creator to relegate him to the limbo of shadows.

Over in one corner I can see some dozen shelves containing more than a hundred volumes of biographies and autobiographies of English judges and barristers — most of them never published over here. "Our British

Brethren" seem to have an insatiable appetite for this sort of thing. Sir Norman Birkett once told me that while he was still at the Bar he had to enjoin, or threaten to enjoin — I have forgotten which — a publisher from putting out a volume giving an account of the cases in which he had participated.

The denouement of a multitude of popular plays has been in a court-room scene. Sir Edward Carson and Sir Edward Clarke were pitted against one another in *Oscar Wilde*. The entire action of *The Trial of Mary Dugan* and of *Libel* took place in the court-room. Indeed, in *Libel* the curtain was never lowered, the end of an act being indicated by the recessing of court.

And there are the humorists. American lawyers may be only mildly interested in recalling that A. P. Herbert, by writing his best seller *Holy Deadlock* and by his efforts as a private member of Parliament, succeeded in the almost impossible task of reforming the anachronistic divorce laws of England; but it is a safe bet that if I handed one any of the three volumes of Herbert's *Misleading Cases in the Common Law* which lie before me, he would find in it an unfailing source of delight. Or if I thought he liked George Ade's brand of humor I might give him one of these four volumes of *Forensic Fables* by Ade's English counterpart, and listen to him chuckle as he realized that British and American judges, lawyers, jurors and witnesses are brothers and sisters under the skin.

Fred Gross has earned his right of admission to this notable, if heterogeneous, company. He has told eight stories of actions or threatened actions at law, and in each instance suspense is admirably sustained by the novelty of the controlling principle. The soundness of the rule is not challenged; justice is not always vindicated by its application; interest is evoked by surprise.

Long and lank Fred Gross is said by his friends to be of the Lincolnian type—"Brooklyn edition." His homely brand of humor is hardly in the gentle style of an Addison or Holmes, Sr. At times he wields a broad-stick or points a barb after the manner of Dean Swift. Hardly concealing his view of modern "justice by ear," his chronicles of cases contain extraordinary "judicial opinions." One putative pronouncement, after "ten nights in a barroom" in a campaign for election, says in summarizing (p. 293) "a statute under attack": "That is not the precise language of the statute, but I do not feel like getting up and walking over to the book shelf to check it up." Again (p. 295), in a purported citation from *"Mutch* v. *Odds* (253 Blunders 119)": "If one studies this statute carefully as I did yesterday while having my shoes polished, he can reach only one conclusion, but I have since forgotten what that conclusion was." Gross' description of common-law marriage, in the course of "The Bigamist" (p. 206), is Rabelaisian: "Wedlock comes on like the migraine, and nothing can be done about it. . . . As the law sees it, one false step makes a hussy; a thousand an honest woman. The subject is somewhat difficult to explain without graphs. The scarlet curve of moral turpitude rises to its greatest height on the first offense, is maintained on a high level for the next few offenses, and then starts on a slow downward slant. If the false steps are regular and persistent the scarlet curve dives out of the chart. The erring woman becomes a worthy matron, whether she likes it or not. . . . If the affair is carried on brazenly and notoriously, the law assumes that the parties were mated in heaven; if the affair is managed with prudence and discretion, the law is scandalized and assumes that the parties are living in sin." Anyhow, in grim times like these, much in this volume is likely to excite loud laughs extending to that part of the body which is more particularly identified in Luke XV:16.

Two features of this volume set it apart from its fellows. New York cases or statutes are cited in the footnotes for every proposition of law advanced and there are many asides in which this former President of the New York State Bar Association gives the views either of that body or of the American Bar Association. One of the longest and best of these is in the ninth and final chapter, "A Judiciary Campaign," and details what most of us have come to accept as the most desirable method of selecting judges.[1]

These asides are so apropos, so sensible and so pungent that they will enhance rather than detract from the interest of either the lawyer or lay reader.

WALTER P. ARMSTRONG.
Memphis, Tenn.

TWILIGHT OF INDIVIDUAL LIBERTY. *By Hamilton Vreeland, Jr. (November, 1944). New York: Charles Scribner's Sons. Pages 174, with notes, index and table of cases. ($2.00).*

This earnest and well-written plea for the concerted action of citizens to regain and retain the historic concept of individual freedom under law is the work of Hamilton Vreeland, Jr., of the New York and the District of Columbia Bars, who has spent in active practice about half of his time during his twenty-eight years of professional life and half in the teaching of law, including constitutional law for fourteen years. The book is specific and persuasive in its demonstration of the changes which have been and are taking place at a rapid rate, principally as a result of judicial decisions.

The author has simplified his subject a great deal, and has produced an incisive portrayal which a layman can read and understand, whether or not he agrees with it. At the same time, the book is made up largely of tracing and analyzing the decisions through which he finds that federal powers have been extended and entrenched at the expense of the states and the individuals, state powers have been somewhat enlarged and fortified, the due process clauses have been limited in scope to such an extent that his-

1. ABA Reports, Vols. 63, page 428; 65, page 247; 66, page 306; 67, page 279.

toric freedoms are insecure, and "an elective despotism" of "democracy" administered by uncontrolled bureaus and agencies has been set up. His attack on the philosophy and influence of Mr. Justice Holmes "pulls no punches".

Mr. Vreeland writes evidently from deep conviction as well as long and careful study. He conceives "English liberty" as consisting necessarily of "a system of standards below which government may not go in the treatment of human beings." In America he regards the "due processes" clauses as declaring standards of liberty which were intended to be beyond the power of majorities to flout. He believes that they have been and are being weakened and destroyed, without an amendment of their text and largely without action by the Congress. His thesis is not new, but his book is well worth reading, by citizens who wish to form an opinion as to the current trends affecting individual liberty in America.

ESCAPE VIA BERLIN. *By Jose Antonio de Aguirre. (1944). New York: The Macmillan Company. Pages 361. $3.00.*

So you wonder why such a title gets into "Books for Lawyers"? Well, this book is by a lawyer, about himself, although it is not in the "Lawyer" series. It is a good book, as well as a most absorbing one, for lawyers in this country to read, just now.

In wartime America the profession of law as a whole has a most honorable record, in countless communities, of leisure sacrificed, war efforts aided, legal assistance rendered without stint, and time and labor given gladly to the furtherance of many projects, without much thought of being inconvenienced. Many thousands of our lawyers are in uniform, and are in mortal combat with enemies in faraway lands.

At the same time, some American lawyers, like other citizens, say or think that they are having pretty tough going, in their offices and their homes. They have a heck of a time getting law clerks, office boys, stenographers, file clerks, and even more trouble in holding them, under RWLB limitations and SSU "white-collar" classifications. Many of our lawyers get more "hot and bothered" with matters before or involving the SEC, the OPA, the USES, the WPB, the FPEC, or other "alphabet" agencies, than they would if they were dodging tanks in dark Ardennes forests or wielding a "bazooka" on the fluid front near Bitche. And some lawyers talk of their troubles in making their meager rations of gasoline take them often enough to their county seats, or perchance to their golf courses or their favorite streams for fishing in season. And how *can* a lawyer think or work without his standard brand of cigarettes.

Will you bear with me while I refer you to the story of another lawyer, to whom the war brought more of "inconvenience" than any of us is undergoing? Jose de Aguirre had been trained in the law by the Jesuits at Deusto, in Spain. In 1940, at the age of 36, he was the elected President of the mysterious republic of less than a million Basques, to whom he had given his oath under an old oak tree at Guernica. His army of 100,000 men fought the cohorts of Hitler, Mussolini, and Franco, bitterly for months, but was overwhelmed by numbers and metal. His boon ally, President Luis Companys of Catalonia, was caught and carted to Barcelona, to be strangled slowly and shamefully by the garotte.

This lawyer and his wife and children became the quarry of the whole Axis pack, in full cry for their blood. So he and they "escaped" from Spain and from Nazi-occupied France into Germany, and lived boldly in Berlin —he as a Panamanian "Dr. Alvarez"— until finally they got away on forged papers to Sweden, to Brazil, and to the United States, where he is now a lecturer in history at Columbia University.

Danger of torture and death, for himself and his loved ones, was ever present in this dramatic exodus. This lawyer took the supreme risks, for liberty under law as he saw it. He fought totalitarianism as few lawyers are fighting it. Whether he was right or wrong in his evaluation of Franco and the attitude of his Church in Spain, is a controversy on which opinions differ and the record is not yet complete. Sufficient for this review is this reference to his courage and audacity of plan, and to the hardships and risks which the war brought to this lawyer. Interesting, isn't it?

TOMORROW'S BUSINESS. *By Beardsley Ruml. (January 11, 1945). New York: Farrar & Rinehart. ($2.50). Pages 238.* Since lawyers have, in military parlance, become in many instances the G-2 and G-3 Sections of modern business organization ("intelligence" and coordination of "operations"), there are plenty of reasons why lawyers should heed and read a book about tomorrow's business, which reflects the outlook of an intrepid, forward-looking thinker who is also held to earth by the practicalities of his part in large-scale merchandising. (R. H. Macy & Co.)

As Beardsley Ruml probably intended, his whole book is wide open to challenge and disagreement, as "middle-of-the-road" counsels are likely to be in this day of sharp divisions. But anything which may lessen numbness and lead to *thinking* has its uses, for lawyers and business men who are trying to look ahead and see "the shape of things to come." Of course, the best of Ruml's ideas sometimes get tangled up, when they are thrown on the table to be dealt with by men who do not understand them or are willing to misuse them. His famous Ruml Plan was meant to ameliorate tax burdens a bit, somewhere along the line; but the legislative result was to add about twenty-five per cent to the federal income taxes lately paid by many folks.

This book isn't about taxes, and its references to legislation are incidental. It deals with American business as an institution or system, and the probable future of private enterprise. Several phases of his exposi-

tion would be interesting as subject-matter for review, but one of them will have to suffice, for this journal.

Reference has often been made to characteristic American institutions as bulwarks of private enterprise and the ideals of freedom—the churches, the family, the schools and colleges, the free press, the organized professions, the free organizations of labor, and the American system of private business. Ruml makes the point that the *rule-making* for the governance of individuals, groups and communities does not emanate solely from legislatures, courts, and administrative agencies. The private but quasi-public institutions also seem to him to make rules and standards, and impose penalties for infractions, although none of these will be found in books of law. Consequently they may require regulation, supervision, accountability, as do agencies of government which are not subject to direct and plenary control by the legislature.

Ruml "does a job" on American Business as a *rule-maker;* also, on labor unionization. He foresees that the emergence of political unionism as "big business" means regulation by government, as to many of its affairs and practices. Ruml does not like all he finds, but he does not pretend to have remedies ready for everything. His catch-phrase is not "freedom for business," but is "business for freedom." He recognizes that freedom can exist only with the sense of certainty which comes from the observance of rules. A number of considerations readily suggest themselves, as impairing the soundness or force of his analogy; but his provocative contribution to a revival of thinking is what he has proposed to carry over into the field of institutional authority, a concept which is commonly asserted as to restrictive rule-making by government.

LEGAL CONTROL OF THE PRESS. *By Frank Thayer. (1944). Chicago: The Foundation Press. ($4.50). Pages xiii, 608. With indices and table of cases.*

LIBERTY AND THE PRESS. *By Phillip Kinsley. (November 13, 1944). Chicago: The Chicago Tribune. ($2.00; by postpaid mail, $2.10). Pages xi, 99. With table of cases.*

These volumes are timely. Their starting-point in common is Professor Thayer's declaration that "Newspapers unfettered and unafraid insure the principles of democratic government" and that whatever "relativity" is injected into the interpretation and enforcement of the constitutional guaranties must not be permitted to impair the essence of bold and independent journalism.

Professor Thayer, of the Illinois Bar, who lectures on the law of the press in the School of Journalism at the University of Wisconsin, has produced a competent and well-documented book of the law concerning those potential or actual legal controls which affect newspapers, magazines, etc., particularly libel, privacy, contempt, copyright, radio competition, reporting of legislative bodies, regulation of advertising, and postal regulations. For lawyers who have to deal with this broadening battlefield of the law, this work is comprehensive and virtually up-to-date, and would merit a fuller review than wartime space permits.

In *Liberty and the Press,* Phillip Kinsley, veteran reporter of famous libel trials, writes trenchantly for the Chicago Tribune the story of its many legal contests to defend and preserve what it deems to be its own independent course of action. One does not need to agree with or like the particular newspaper to evaluate the significance of many of the incidents chronicled with a reporter's skill for his employer's cause. Freedom of the press necessarily is not limited to those publications which express opinions with which one agrees.

The many instances which Kinsley narrates do not make pleasant reading for those who believe in a press free to express its opinion of public officials and official acts. A lot of explaining will be required to destroy the impression that many or most of the facts told would "stand up" under fair inquiry. The assembling of this chronicle is an important service to freedom of the press in America, at a time when our country is waging war to assure it in other lands.

Recent Publications

LATIN AMERICA IN THE FUTURE WORLD, by George Soule, David Efron and Norman News. New York: Farrar & Rinehart. $3.50.

WAR CRIMINALS, THEIR PROSECUTION & PUNISHMENT, by Sheldon Glueck. 1944. New York: Alfred A. Knopf. Pages viii, 250, and index. Price $3.00.

AMERICA'S FAR EASTERN POLICY, by T. A. Bisson. 1945. New York: The Macmillan Company. Pages xiii, 235. $3.00.

AXIS RULE IN OCCUPIED EUROPE, by Raphael Lemkin. 1944. New York: Columbia University Press. Pages xxxviii, 674. $7.50.

CREDIT MANUAL OF COMMERCIAL LAWS. 1945. New York: National Association of Credit Men. Pages v, 789. $6.50.

LEGAL AID CLINIC INSTRUCTION AT DUKE UNIVERSITY, by John S. Bradway. Durham, North Carolina: Duke University Press. 1944. Pages ix, 126.

AN INTELLIGENT AMERICAN'S GUIDE TO THE PEACE, under the general editorship of Sumner Welles, 1945. New York: The Dryden Press. Pages vi, 370. Price $3.75.

AMERICAN BAR ASSOCIATION
Journal

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Unity

A recent overseas broadcast reports Field Marshal Sir Bernard L. Montgomery as saying: "Here we are, Americans, Canadians, Britons and French, standing close together on a line which we are now firmly holding and from which we shall go forward together to victory. We must let no one drive a wedge between us."

Undoubtedly that great soldier had in mind more than the mere military significance of those words.

Those of us who at our annual meeting in Chicago last September saw the great progress there made towards an almost unanimous accord as to the necessity of an organization of the nations for the establishment of an enduring peace, the substitution of justice for force, the decision of disputes between nations by a judicial instrumentality, preferably the Permanent Court of International Justice, with expanded judicial powers and a broader international law, may also say: "Let no one drive a wedge between us."

The recent regional meetings at Boston and Chicago demonstrated that the men of our profession are steadily proceeding to a closer accord on fundamentals. What differences of opinion remain are chiefly matters of detail as to how and when particular things are to be done. Those differences will diminish and ultimately disappear as the result of friendly and tolerant discussion.

At the broadcast under the auspices of the American Bar Association, Sunday, January 7, over Mutual, one of the speakers was an American soldier who had served in the long, bitter and victorious campaign of our Army in Egypt, who is now on special duty as representative of American Veteran Organizations. He was asked what American soldiers want us to do, what desires they most frequently express. He replied that what the American soldiers were most agreed upon and what they most desired was that something should be done to put a permanent end to war.

Let no one drive a wedge between us and our sons and brothers fighting for us in distant lands.

International Law of the Future

In our department, "Books for Lawyers," (December issue, page 678) there was published Professor Sohn's review of *Peace Through Law*, by Hans Kelsen. This review brings to light an issue which has been raised elsewhere and which neither the book nor the review assumes to answer.

The question is whether the judicial instrumentality to which shall be referred for decision disputes between nations, should have power to decide those disputes by what international law is, or when there is no generally accepted law applicable to points at issue, the international tribunal should be empowered to decide the disputes by what the law ought to be.

We do not here intend to discuss that question, but we turn to the eminent men of our profession deeply learned and widely experienced in international law, we ask what can be done now by the agreement of the peace-loving nations to supplement international law so that there shall be recognized principles of the law of nations applicable to those disputes between nations from which wars have most frequently arisen in the past, and are most likely to arise in the future.

The inadequacy of international law in the respect above referred to is recognized by suggestions for "the international law of the future" published in the January issue, page 42. Those suggestions came from distinguished and competent sources and are tendered to the nations of the world for filling the gaps in the law of nations which have made that law heretofore so impotent for the prevention of war.

One of the inadequacies of the international law of today for the prevention of war is illustrated by an examination of the almost universal law which forbids the individual to resort to force for the decision of his disputes with his neighbor, and which commands him to present his complaint to a court of justice. There is no such law binding on nations.

There is, of course, one exception to the foregoing statement. Boundary disputes between the states of the United States are placed within the jurisdiction of our Supreme Court. To us it has been a matter of course to have those disputes so decided. In the year just passed two disputes of that nature were decided by our Supreme Court. Moreover, by the adoption of our Constitution our Sovereign States have surrendered the right to declare or to wage war.

Much more may be needed to make the International Law of the Future adequate for the preservation of a

just peace, but would not such a provision be a step toward the prevention of wars and a step toward a more effective judicial instrumentality in a world-wide sphere!

Joseph Rogers Taylor, 1875-1945 —An Appreciation

Joseph R. Taylor, who for nineteen years, 1920-1939, faithfully and ably served the JOURNAL as managing editor, died at his home, "The Anchorage," at Ocean Springs, Mississippi, on January 15.

He completed his legal education at the University of Texas and was admitted to the Bar in 1893 at Austin, Texas. However, he did not practice law, as he was soon diverted to journalism, and after serving in an editorial capacity on several papers here and abroad, eventually "returned" to his chosen profession by becoming managing editor of the JOURNAL.

He held the high esteem of all those associated with him in his work and of those who, even though not personally acquainted with him, have seen and appreciated the value of his devoted and effective service to the JOURNAL and its readers.

For the Board of Editors
EDGAR B. TOLMAN

Federal Rules of Criminal Procedure

The long tour of duty of our former President, Arthur T. Vanderbilt, and of his seventeen fellow members of the Advisory Committee on Criminal Procedure appointed February 3, 1941, by the Supreme Court of the United States, has come to a successful termination of the first stage of the great task assigned to them. The rules have been approved by the Court and transmitted by Attorney General Biddle to the Congress.

There still remains important work to be done. The rules must be considered by the Judiciary Committees of both houses of the Congress. Those Committees will undoubtedly give long continued and careful study to the Federal Rules for Criminal Procedure. There will be questions which the Advisory Committee will be called upon to answer and it is no small undertaking to furnish the Committees on the Judiciary with the knowledge acquired by four years of study and debate.

In some respects the task of the Advisory Committee on Criminal Procedure was more difficult and delicate than that of the Committee on Civil Procedure. Lawyers engaged in the trial of civil cases are not so sharply divided by the nature of their respective activities as are those engaged in the prosecution and the defense of persons accused of crime. The Supreme Court wisely decided to appoint on the Criminal Rules Committee those who had served as prosecutors, and others whose professional activities had included the defense of persons accused of crimes.

The first great triumph of the Committee was that they themselves had reached an agreement.

The regulation of court procedure by the courts, with the aid of those who practice in the courts, has met with the well-nigh unanimous approval of the profession. It met with the approval of intelligent laymen even before the doubts of some lawyers and judges were fully resolved. The success of the Federal Rules of Civil Procedure has been demonstrated by six years of practical experience.

We prophesy with confidence that the new, simple, and uniform rules for the administration of justice in the criminal courts will meet with the approval of the Senate and House Committees.

Outstanding Work Well Done

In the columns of our "Practising Lawyer's Guide to the Current Law Magazines," there is contained this month a deserved commentary on what has proved to be a "valedictory" article by John Lord O'Brian, lately resigned as General Counsel for the War Production Board, who since early 1941 has been in charge of the legal aspects of organizing the procurement of materials and the production of munitions and supplies, to meet the requirements of all-out war in two hemispheres.

The services which lawyers as such have performed for their country, in World War II, have been many and varied; and some of them have been distinguished. Many of these services have been rendered in uniform and with military or naval rank. But when the whole record has been put together and written, it is unlikely that any instance will be found of public service by a lawyer which bears more indelibly, than does the work of John Lord O'Brian in the OPM and the WPB, the hall-marks of first-rate ability, untiring industry, intense patriotism and devotion, and unusual capacity for keeping only the paramount job in mind.

This lawyer remained aloof from all factions. He neither fought nor favored any ideology. He worked amiably with all manner of men, in government and in private industry. He understood the problems of business men under war conditions; he had patience with their fears, and found the ways of quieting them; he utilized to the utmost the eagerness of these men to help in the great tasks. Despite the urgencies and the pressures, he held fast to the American lawyer's way of doing things fairly.

John Lord O'Brian wore no uniform, put on no ribbons and no braid. His "service stars" were only of the "home front", where lives of our sons were saved or sacrificed according as the battles for maximum production were won or lost in particular industries or plants. He will never be eligible for a cover-portrait and sketch in our lawyer-soldier series; but, somehow, as our commentator on his work suggests, this lawyer is richly entitled to go home with the abiding satisfaction that he has rendered a patriotic service with diligence and skill which is "beyond the call of duty" and was in all respects performed in a manner which reflects lasting credit on the whole profession of law.

Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Civil Liberties—Race Discrimination —Constitutional Powers of the President in Time of War.

All legal restrictions which curtail the civil rights of a single racial group of our citizens must be subjected to the most rigid scrutiny.

It was not beyond the war power of Congress and the Executive to exclude citizens of Japanese ancestry from the West Coast area while threatened by Japanese attack and to transfer them to and detain them in assembly camps or relocation centers.

Korematsu v. *United States,* 89 L. ed. Adv. Ops. 202; 65 Sup. Ct. Rep. 193; U. S. Law Week 4062. (No. 22, argued October 11 and 12, decided December 18, 1944).

The Act of March 21, 1942, provides that persons of Japanese ancestry who "enter, remain in, leave, or commit any act in a military area," contrary to the prescriptions applicable thereto, are guilty of a misdemeanor and are subject to fine or imprisonment or both.

Korematsu, an American citizen of Japanese descent, was convicted of remaining in a "military area," contrary to a duly authorized Exclusion Order which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to Korematsu's loyalty to the United States. The Circuit Court of Appeals affirmed. On certiorari, the Supreme Court also affirmed.

The opinion of the Court was delivered by Mr. Justice BLACK. His opinion is prefaced by the following statement:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

The provisions of the Act, and the various military exclusion and other orders are examined. It is shown that in the *Hirabayashi* case (the Japanese curfew case), the constitutionality of that Act and the validity of the same series of orders was fully considered and sustained and it is said:

> In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In addition to the points raised and settled in the *Hirabayashi* case it was argued that by May, 1942, when Exclusion Order No. 34 was promulgated, all danger of Japanese invasion was over. As to that point Mr. Justice BLACK says:

> Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

To the plea of hardship to Japanese citizens who were loyal to the United States it was said:

> . . . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It was also urged that the military orders, with their contradicting commands not to enter, not to remain and not to leave the prescribed military area failed to distinguish lawful

*Assisted by JAMES L. HOMIRE; Tax cases by Committee on Publications of the Section of Taxation, Mark H. Johnson, chairman.

from unlawful conduct. The Act and the various orders were examined and interpreted as a whole, each in the light of the other. In this respect the opinion says:

. . . The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

* * *

. . . Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted.

* * *

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

* * *

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice.

* * *

. . . Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Mr. Justice FRANKFURTER delivered a concurring opinion in which, in reply to the contention that General DeWitt's orders were contradicting, he says:

. . . Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, *i.e.*, by reporting to the Assembly Center.

As to the President's war powers, he says:

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully."

Mr. Justice JACKSON dissented. Of the unusual and confusing character of the military orders he says:

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority.

As to the essential element of the crime he says:

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth.

Of the Japanese curfew case he says:

The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding.

Closing his dissent Mr. Justice JACKSON says:

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

Mr. Justice MURPHY also dissented. The grounds of his dissent appear from the following excerpts from his opinion:

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.

* * *

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation.

* * *

No adequate reason is given for the failure to treat these Japanese-Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry.

* * *

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Mr. Justice ROBERTS opens his dissenting opinion as follows:

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

A chronological recitation of events then follows from which it is said to be made plain that the offense "did not, in truth, consist in refusal voluntarily to leave the area which included his home. In this recitation emphasis is laid on the conflicting provisions of the military orders of

exclusion. On this Mr. Justice ROBERTS says:

> I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.
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> • • •
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> Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.
>
> • • •
>
> I would reverse the judgment of conviction.

The case was argued by Mr. Wayne M. Collins and Mr. Charles A. Horsky for Korematsu and by Mr. Solicitor General Fahy for the United States.

Civil Liberties—Race Discrimination—Rights of Loyal Citizens of Foreign Ancestry—Habeas Corpus.

An American citizen, though of Japanese descent, cannot be restrained of liberty in the absence of proof of disloyalty except to such limited extent as may be essential to meet temporary emergencies.

Ex Parte Mitsuye Endo, 89 L. ed. Adv. Ops. 219; 65 Sup. Ct. Rep. 208; U. S. Law Week 4054. (No. 70, argued October 12, decided December 18, 1944).

This case involves questions similar to those involved in the *Korematsu* case, but a different decision was reached because of a difference in the record facts.

In the *Korematsu* case the accused, whose loyalty to the United States was neither established nor disproved, was found guilty of remaining in a military district from which American citizens of Japanese ancestry were excluded by an act of Congress and certain military orders. In this case a woman born in this country of Japanese parents and whose loyalty was established and who had disobeyed no law, was transported to a War Relocation Center and there detained against her will. She filed a petition for habeas corpus. Her petition was denied. An appeal was presented to the Circuit Court of Appeals for the District of Columbia. The case came to the Supreme Court on questions certified to that Court by the court of appeals. The Supreme Court ordered the entire record brought before it and upon consideration of all the questions so presented, reversed the judgment of the district court.

The opinion of the Court was delivered by Mr. Justice DOUGLAS. The method of operation of relocation centers is first described and it is said:

> The program of the War Relocation Authority is said to have three main features: (1) the maintenance of Relocation Centers as interim places of residence for evacuees; (2) the segregation of loyal from disloyal evacuees; (3) the continued detention of the disloyal and so far as possible the relocation of the loyal in selected communities.

For the relocation of the loyal there was an intricate and prolonged program. The loyal were not given complete liberty when the investigation established loyalty. On this subject Mr. Justice DOUGLAS says:

> But even if an applicant meets those requirements, no leave will issue when the proposed place of residence or employment is within a locality where it has been ascertained that "community sentiment is unfavorable" or when the applicant plans to go to an area which has been closed by the Authority to the issuance of indefinite leave. Nor will such leave issue if the area where the applicant plans to reside or work is one which has not been cleared for relocation. Moreover, the applicant agrees to give the Authority prompt notice of any change of employment or residence. And the indefinite leave which is granted does not permit entry into a prohibited military area, including those from which these people were evacuated.

Miss Endo's petition for habeas corpus alleges that she is a loyal and law-abiding citizen of the United States; that no charge was ever made against her, that she is being unlawfully detained and that she is kept in a relocation center against her will. A demurrer was interposed to the petition and sustained.

It was conceded by the Department of Justice and the War Relocation Authority that Miss Endo is a loyal and law-abiding citizen, that she is not detained on any charge. They do not contend that she may be held any longer in the Relocation Center but they maintain that detention after leave clearance has been granted is an essential step in the evacuation process.

As to this proferred justification of a temporary detention Mr. Justice DOUGLAS says:

> *First.* We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.
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> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Coming to the final question Mr. Justice DOUGLAS says:

> Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.
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> *Second.* The question remains whether the District Court has jurisdiction to grant the writ of *habeas corpus* because of the fact that while the case was pending in the Circuit Court of Appeals appellant was moved from the Tule Lake Relocation Center in the Northern District of California where she was originally detained to the Central Utah Relocation Center in a different district and circuit.

Reviewing prior decisions on this point Mr. Justice DOUGLAS says:

> We need not decide whether the presence of the person detained within the territorial jurisdiction of the District Court is prerequisite to filing a petition for a writ of *habeas corpus*. . . . . We only hold that the District Court acquired jurisdiction in this case and that the removal of Mitsuye Endo did not cause it to lose jurisdiction where a person in whose custody she is remains within the district.

Mr. Justice MURPHY filed a concurring opinion in which he expresses the view that detention in relocation centers of American citizens of Japanese ancestry, regardless of loyalty, is not only unauthorized by Congress or the Executive, but is another example of the unconstitutional resort to racism inherent in the entire

evacuation program.

The case was argued by Mr. James O. Purcell for Miss Endo and by Mr. Solicitor General Fahy for Eisenhower.

Eminent Domain—Just Compensation —Taking Temporary Occupancy of Portion of a Leasehold Interest.

When the total of all the rights which make up ownership in fee simple just compensation is measured by fair market value, and no consequential damages such as expense of removing business equipment or other personal property to a new location cannot be allowed, but when a temporary right of occupancy is taken for a limited period after which the owner's former right will revert to him. Actual loss to the owner caused by the destruction of trade fixtures and the like as a part of just compensation.

United States v. *General Motors Company,* 89 L. ed. Adv. Ops. 379; 65 Sup. Ct. Rep. 357; U. S. Law Week 4119. (No. 76, argued November 16-17, 1944, decided January 8, 1945).

In 1928 General Motors leased a building for a term of twenty years, for the storage and distribution of automobile parts and equipped the building with fixtures made for that use. In 1942 the United States became a subtenant of part of the floor space in the building. Early in the same year the Secretary of War under the authority of the Second War Powers Act caused to be instituted proceedings for combination of the occupancy of the remaining 93,000 square feet for a term ending June 30, 1943. A petition was filed June 8, 1942 in the District Court for temporary use and immediate possession. On the same day the Court entered an order declaring the property condemned for the term ending June 30, 1943 and granting the United States immediate possession. On service of the order General Motors began removing its personal property and demolishing bins and fixtures and surrendered the space to the Government eleven days after the entry of the order. After proving the authority for the taking, the attorney for the Government called a real estate expert. He gave his opinion that the fair rental value of the space was 35 cents per year per square foot. The Government then rested. General Motors then called expert witnesses who testified that, in their opinion, the fair rental value was 43 cents per square foot. It was also shown that the rent actually paid from 1940 through 1942 varied from 41.9 to 43.24 cents.

Proof was also offered of the various items of cost caused by the removal of the contents of the building, shipping them to other locations, the original cost of the original installation wholly lost by the dismantling of the building, all in much detail. The Court sustained an objection to the offer. The jury awarded compensation at the rate of approximately 40 cents for one year. The Circuit Court of Appeals, in a two-to-one opinion reversed the judgment, holding that the item of actual loss might be proved, not as independent items, but as elements to be considered in the ascertainment of just compensation, and remanded the case for a new trial in accordance with its ruling.

Because those rulings were deemed fundamental on the new trial, the Supreme Court reviewed the case, modified the judgment of the Court of Appeals, and affirmed it as modified. Mr. Justice ROBERTS delivered the opinion of the Court. In the opening paragraph of his opinion he says:

> This case is one of first impression in this Court. It presents a question on which the decisions of federal courts are in conflict. The problem involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease.

The opinion then cites the provisions of the Second War Powers Act calling special attention to the provision that on or after the filing of the condemnation proceeding immediate possession might be taken and the property occupied, used, or improved.

As to the constitutional question involved, Mr. Justice ROBERTS says:

> The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: "nor shall private property be taken for public use, without just compensation", which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.

It is next pointed out that the critical terms are "property," "taken" and "just compensation." As to the first of those terms:

> It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years", as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

As to the second of those critical terms, it is said:

> Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

As to the third of those critical terms, "just compensation," the vital issue in the controversy is one in which is approached the taking of an interest in fee of the lesser interest here involved, a temporary right of occupancy.

On this point, Mr. Justice ROBERTS says:

> In the trial of this case the parties presented evidence of the market value of the occupancy of bare floor space for the term taken. The respondent's offer to prove additional items for which is claimed compensation was overruled. The award was therefore limited to the market value of the occupancy of a vacant building. The question is whether any other element of value inhered in the interest taken. The sovereign ordinarily takes the fee. The

rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.

* * *

The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use?

As to the first of these questions, Mr. Justice ROBERTS says:

While, as has been said, the Government's power to take for a short period, and to demand possession of the space taken freed of all equipment of personal property therein, cannot be denied, three questions emerge which are not presented when what is taken is a fee interest in land. They are: 1. Is the long-term rental value the sole measure of the value of such short-term occupancy carved out of the long term? 2. If the taking necessitates the removal of personal property stored in the building in conformity to the normal use of such a building, is the necessary expense of the removal to be considered in computing compensation? 3. If a tenant's equipment and fixtures are taken or destroyed, or reduced in value, by the Government's action, must it compensate for the value thus taken or destroyed in addition to paying the rental value of the occupancy?

* * *

In the present case the respondent offered to prove that the actual expense of moving its property exceeded $46,000, and the loss due to destruction and removal of fixtures and fixed equipment exceeded $31,000, in addition to its continuing liability to pay rent for the year of approximately $40,000; whereas the award was $38,597.86. If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation" into some such concept as the common law idea of a peppercorn in the law of seizin, or the later one of "value received" in that of contractual consideration. If the value to be paid in a case like the present is confined, as matter of law, to the long term rental of bare space, the owner will not be secure, either in his rights of property, or in his right to just compensation as a substitute for it, when the Government takes it for the use and benefit of all.

Here Mr. Justice ROBERTS reaffirms the existing rule for the consequences of taking the fee and that for such a taking the measure of compensation does not include consequential damages. On the other hand, he says:

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principle.

As to the second of the questions above-posed, Mr. Justice ROBERTS says:

Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these purposes. We think that the proof should have been received for the purpose and with the limitation indicated. Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning.

As to the third question, it is said:

For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected.

* * *

In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice MURPHY took no part in the consideration or decision of this case.

Concurring in part, Mr. Justice DOUGLAS says:

I agree that respondent is entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking. I likewise agree that respondent is entitled to a further increase in its award. The award granted is less than the rental which it is under a continuing obligation to pay the lessor. The United States is occupying the premises and paying about 40c a square foot while respondent continues to pay 42c to the landlord. In these special circumstances it is difficult to see how a lessee receives that just compensation to which he is entitled unless the United States pays the full rental.

The case was argued by Mr. Vernon L. Wilkinson for the Government, and by Mr. John Thomas Smith for General Motors.

Federal Statutes—Fair Labor Standards Act of 1938—Child Labor.

The legislative history of the Fair Labor Standards Act fails to show, to some extent, negative Congressional intent thereby to prohibit child labor in interstate commerce in the delivery of telegraph messages.

Western Union Telegraph Company v. *Lenroot*, 89 L. ed. Adv. Ops. 289; 65 Sup. Ct. Rep. 335; U. S. Law Week 4106. (No. 49, argued November 8 and 9, 1944, decided January 8, 1945.)

In some localities where the state law permitted it, Western Union Telegraph Company employed less than 12 per cent of its messengers who were under sixteen years of age. This was thought to be contrary to the Fair Labor Standards Act of 1938. On the complaint of the Federal Children's Bureau a District Court restrained the company from transmitting messages in interstate

commerce until thirty days after it had ceased such employment. The Circuit Court of Appeals affirmed. The Supreme Court granted certiorari and reversed.

The opinion of the Court was delivered by Mr. Justice JACKSON. After stating that the only issue before the Court is whether the Fair Labor Standards Act applies to the conceded employment of children under sixteen years of age in the delivery of telegraph messages, the opinion first takes up the language of the Act and it is said:

> It is conceded that the Act does not directly prohibit the employment of these messengers, because it contains no prohibition against employment of child labor in conducting interstate commerce. It is conceded, too, that language appropriate directly to forbid this employment was proposed to Congress and twice rejected.

The legislative history of the Act is then examined in careful detail and it is said:

> Our search of legislative history yields nothing to support the Company's contention that Congress did not want to reach such child labor as we have here. And it yields no more to support the Government's contention that Congress wanted to forego direct prohibition in favor of indirect sanctions. Indeed, we are unable to say that elimination of the direct prohibitions from the final form of the bill was purposeful at all or that it did not happen from sheer inadvertence, due to concentration on more vital and controversial aspects of the legislation. The most that we can make of it is that no definite policy either way appears in reference to such an employment as we have in this case, no legislative intent is manifest as to the facts of this case which we should strain to effectuate by interpretation.

Passing next to the question of an "indirect" prohibition of child labor in interstate commerce, Mr. Justice JACKSON says:

> The Government brought this action to reach indirectly child labor in interstate commerce by bringing it under the prohibition of Section 12 (a) of the Act, which so far as material reads "no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed.". . . Its complaint charges the Western Union with a violation in that "defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, . . ."

The opinion considers the contention of the Government that messages are "goods" and sustains it, saying:

> We think telegraphic messages are clearly "subjects of commerce" and hence that they are "goods" under this Act, as alleged in the complaint.

The next inquiry was whether Western Union is a "producer" of the "goods" under the Act. On this point the opinion declares:

> We think the Government has not established its contention that the Western Union is a "producer" of telegraph messages.

A third inquiry of highly technical character was then considered, namely: "Has the Company engaged in 'shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment' as alleged?"

This fascinating speculation was examined and Mr. Justice JACKSON says:

> We do not think it is necessary for us to resolve the interesting but baffling inquiry as to precisely what, if anything, moves across state lines in the telegraphic process. In its practical aspects, which concern the public, transmission of messages is too well known to require analysis; and in its scientific aspects, which interest the physicist, it is too little known to permit of it.

The final conclusion of the Court is expressed by Mr. Justice JACKSON as follows:

> Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. Had the omission of a direct prohibition of this employment been called to its attention, it might well have supplied it, for any reason we can see. Congress of course has the right to be indirect where it could be direct and to be obscure and confusing where it could be clear and simple. But had it determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms.
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> After all, this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation. Declining that, we cannot sustain the Government's bill of complaint.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE joined.

The nature and extent of the divergence of views is disclosed by the following excerpts from the dissenting opinion:

> The opinion of the Court demonstrates that the legislative history of the Fair Labor Standards Act is inconclusive insofar as the failure to insert a provision directly prohibiting child labor in interstate commerce is concerned. But that factor is neither determinative nor even significant in the setting of this case. The issue is not whether the child labor provisions of Section 12 (a) apply to a company solely engaged in interstate commerce or in the transporting of goods in such commerce. Rather the crucial problem is whether Western Union, in preparing messages for transmission in interstate commerce, may fairly be said to be a "producer" of "goods" which it "ships" in interstate commerce so as to come within the purview of Section 12 (a). That Western Union may also be the interstate transmitter of messages is beside the point; it is enough if it is a producer of goods destined for interstate shipment.
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> We are charged with the duty of interpreting any applying acts of Congress in accordance with the legislative intent. Courts are not so impotent that they cannot perform that duty and, at the same time, grant stays or other appropriate relief in the public interest should the occasion demand it. Thus if the injunction is granted here against Western Union, we will have vindicated to that extent the public policy against oppressive child labor. If a 30-day suspension of telegraph messages would unduly harm the public interest, a stay of the mandate or of the injunction can be granted until at least 30 days have elapsed during which no oppressive child labor has been employed by Western Union. Thus by fashioning remedies through injunctions and stays we can aid in the elimination of oppressive child labor without undue hardship on the public. This can and should be done without abdicating our judicial function and assuming the role of the legislature.

The case was argued by Mr. Francis B. Stark for Western Union and by Mr. Douglas B. Maggs for Lenroot.

Railway Labor Act—Duty of Bargaining Agent of Union to Represent Minority Membership.

The Act imposes on a Labor Organization, acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in

the craft without discrimination because of their race.

Bester William Steele* v. *Louisville & Nashville Railroad Company, 65 Sup. Ct. Rep. 226; 89 L. ed. Adv. Ops. 172; U. S. Law Week 4075. (No. 45, argued November 14 and 15, decided December 18, 1944).

The petitioner, a locomotive fireman, filed a bill of complaint in the Alabama Circuit Court, against his employer (the respondent Railroad) an unincorporated labor organization (the respondent Brotherhood) and certain individuals representing the Railroad or the Brotherhood. The material allegations of the bill of complaint are summarized in the Supreme Court's opinion as follows:

Petitioner, a negro, is a locomotive fireman in the employ of respondent railroad, suing on his own behalf and that of his fellow employees who, like petitioner, are negro firemen employed by the Railroad. Respondent Brotherhood, a labor organization, is, as provided under §2, Fourth of the Railway Labor Act, the exclusive bargaining representative of the craft of firemen employed by the Railroad and is recognized as such by it and the members of the craft. The majority of the firemen employed by the Railroad are white and are members of the Brotherhood, but a substantial minority are negroes who, by the constitution and ritual of the Brotherhood, are excluded from its membership. As the membership of the Brotherhood constitutes a majority of all firemen employed on respondent Railroad, and as under §2, Fourth the members because they are the majority have the right to choose and have chosen the Brotherhood to represent the craft, petitioner and other negro firemen on the road have been required to accept the Brotherhood as their representative for the purposes of the Act.

On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of firemen, without informing the negro firemen or giving them opportunity to be heard, served a notice on respondent Railroad and on twenty other railroads operating principally in the southeastern part of the United States. The notice announced the Brotherhood's desire to amend the existing collective bargaining agreement in such manner as ultimately to exclude all negro firemen from the service. By established practice on the several railroads so notified only white firemen can be promoted to serve as engineers, and the notice proposed that only "promotable," i.e. white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs.

On February 18, 1941, the railroads and the Brotherhood, as representative of the craft, entered into a new agreement which provided that not more than 50% of the firemen in each class of service in each seniority district of a carrier should be negroes; that until such percentage should be reached all new runs and all vacancies should be filled by white men; and that the agreement did not sanction the employment of negroes in any seniority district in which they were not working. The agreement reserved the right of the Brotherhood to negotiate for further restrictions on the employment of negro firemen on the individual railroads. On May 12, 1941, the Brotherhood entered into a supplemental agreement with respondent Railroad further controlling the seniority rights of negro firemen and restricting their employment. The negro firemen were not given notice or opportunity to be heard with respect to either of these agreements, which were put into effect before their existence was disclosed to the negro firemen.

Until April 8, 1941, petitioner was in a 'passenger pool,' to which one white and five negro firemen were assigned. These jobs were highly desirable in point of wages, hours and other considerations. Petitioner had performed and was performing his work satisfactorily. Following a reduction in the mileage covered by the pool, all jobs in the pool were, about April 1, 1941, declared vacant. The Brotherhood and the Railroad, acting under the agreement, disqualified all the negro firemen and replaced them with four white men, members of the Brotherhood, all junior in seniority to petitioner and no more competent or worthy. As a consequence petitioner was deprived of employment for sixteen days and then was assigned to more arduous, longer, and less remunerative work in local freight service. In conformity to the agreement, he was later replaced by a Brotherhood member junior to him, and assigned work on a switch engine, which was still harder and less remunerative, until January 3, 1942. On that date, after the bill of complaint in the present suit had been filed, he was reassigned to passenger service.

Protests and appeals of petitioner and his fellow negro firemen, addressed to the Railroad and the Brotherhood, in an effort to secure relief and redress, have been ignored. Respondents have expressed their intention to enforce the agreement of February 18, 1941 and its subsequent modifications. The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the firemen's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the Act to represent the negro firemen impartially and in good faith; but instead, in its notice to and contracts with the railroads, it has been hostile and disloyal to the negro firemen, has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of employment in their craft, all in order to create a monopoly of employment for Brotherhood members.

The bill of complaint asks for discovery of the manner in which the agreements have been applied and in other respects; for an injunction against enforcement of the agreements made between the Railroad and the Brotherhood; for an injunction against the Brotherhood and its agents from purporting to act as representative of petitioner and others similarly situated under the Railway Labor Act, so long as the discrimination continues, and so long as it refuses to give them notice and hearing with respect to proposals affecting their interests; for a declaratory judgment as to their rights; and for an award of damages against the Brotherhood for its wrongful conduct.

Demurrers to the bill of complaint were sustained by the Alabama Circuit Court and by the Supreme Court of Alabama. The latter construed "the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow negro employees by negotiating the contracts discriminating against them." Certiorari was granted and the judgment of the Supreme Court of Alabama reversed, the opinion of the Court being rendered by the CHIEF JUSTICE. Mr. Justice BLACK concurred in the result, and Mr. Justice MURPHY delivered a concurring opinion stressing the constitutional problem involved.

The opinion of the Court states:

If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any

commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. Since petitioner and the other negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act. Section 2, Fourth providest "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . ." Under Secs. 2, Sixth and Seventh, when the representative bargains for a change of working conditions, the latter section specifies that they are the working conditions of employees "as a class." Section 1, Sixth of the Act defines "representative" as meaning "Any person or . . . labor union . . . designated either by a carrier or a group of carriers or by its or their employees to act for it or them." The use of the word "representative," as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.

By the terms of the Act, Sec. 2, Fourth, the employees are permitted to act "through" their representative, and it represents them "for the purposes of" the Act. Sections 2, Third, Fourth, Ninth. The purposes of the Act declared by Sec. 2 are the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein," and this aim is sought to be achieved by encouraging "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." . . . These purposes would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid.

Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. . . . The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. . . .

The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them.

* * *

Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . . but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. . . . Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. . . .

* * *

The case was argued by Mr. Charles H. Houston for the petitioner, by Mr. Charles H. Eyster for the respondent Railroad, and by Mr. James A. Simpson for the respondent Brotherhood.

Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, et al., 89 L. ed. Adv. Ops. 181; 65 Sup. Ct. Rep. 235; U. S. Law Week 4079. (No. 37, argued November 14, decided December 18, 1944).

This is a companion decision to the preceding case, which it follows on the same question there raised. In addition the Court's opinion, delivered by the CHIEF JUSTICE, holds that "the right asserted by petitioner which is derived from the duty im-

posed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. . . . The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. Sec. 41 (8), Judicial Code Sec. 24 (8)", and diversity of citizenship is unnecessary.

The case was argued by Mr. Charles H. Houston for the petitioner, by Mr. James G. Martin for Norfolk Southern Ry. Co., and by Mr. Harold C. Heiss for the respondent Brotherhood.

Selective Service Act of 1940—Prosecution for Conspiracy to Violate.

Section 11 of the Act embraces all conspiracies to violate the Act, whether or not involving force or violence.

Willard Irwin Singer and Martin H. Singer* v. *United States, 89 L. ed. Adv. Ops. 262; 65 Sup. Ct. Rep. 282; U. S. Law Week 4086. (No. 30, argued and submitted November 10, 1944, decided January 2, 1945).

The petitioners and another were indicted for conspiracy to aid one of the petitioners in evading service in the armed forces. A demurrer to the indictment on the ground that an overt act was necessary was overruled. Petitioners were tried, found guilty, and the convictions upheld by the Circuit Court of Appeals for the Third Circuit. Certiorari was granted, limited to the question whether the conspiracy charged constituted an offense under Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894-895, 50 U. S. Ct. App., Sec. 311. By a divided Court the judgment was affirmed, Mr. Justice DOUGLAS delivering the prevailing opinion.

Section 11 of the Act, so far as relevant, provides as follows:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or *conspire to do so,* shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ." (Italics added.)

Construing this provision, the prevailing opinion states:

> The section does not require an overt act for the offense of conspiracy. It punishes conspiracy "on the common law footing." . . . Hence the indictment is sufficient if the words "or conspire to do so" extends to all conspiracies to commit offenses against the Act. It is insufficient if the conspiracy clause is limited to conspiracies to "hinder or interfere in any way by force or violence" with the administration of the Act. If it is so limited then it would have been necessary to sustain the indictment under § 37 of the Criminal Code, 18 U. S. C. § 88, which requires the commission of an overt act. . . .
>
> Though the matter is not free from doubt, we think the conspiracy clause of § 11 is not limited but embraces all conspiracies to violate the Act. That is the view of the Court of Appeals for the Second Circuit (*United States v. O'Connell,* 126 F. 2d 807) as well as the court below. We think that construction is grammatically permissible and conforms with the legislative scheme.
>
> Seven offenses precede the conspiracy clause. Each is set off by a comma. A comma also precedes the conspiracy clause and separates it from the force and violence provision just as the latter is separated by a comma from the clause which precedes it. The punctuation of the sentence indicates that the disjunctive conspiracy clause is the last independent clause of a series not a part of the preceding clause. A subject of "conspire" must be supplied however the conspiracy clause is read. It is true that the subject must be plural and that the subject of each of the preceding clauses is singular except "any person or persons" in the force and violence clause. But it does not follow that the conspiracy clause is hitched solely to the preceding clause. When read as applicable to all the substantive offenses, the verb "conspire" is proper since some of the subjects would be singular and some plural.
>
> A question remains concerning the word "so". The structure of the sentence as a whole suggests that the reference is to all the offenses previously enumerated. The seven offenses which precede the conspiracy clause are substantive offenses. Each carries the same penalty and is punishable in the same manner. The conspiracy clause comes last and is separated from the preceding one by a comma. If the word "so" is read restrictively, then one type of conspiracy is set apart for special treatment. If our construction is taken, a rational scheme results with the same maximum penalties throughout—all types of conspiracies being treated equally, just as the substantive offenses are treated alike. No persuasive reason has been advanced why the words "conspire to do so" should not carry their natural significance. The principle of strict construction of criminal statutes does not mean that they must be given their narrowest possible meaning.

After discussing the legislative history, which it concludes "throws only a little light on this problem", the opinion continues:

> Nor do we find force in the suggestion that the conspiracy clause was added merely to fill in gaps left by § 6 of the Criminal Code which covers only conspiracies to obstruct by force "the execution of any law of the United States". It is said that *United States v. Eaton,* 144 U. S. 677, established as a principle of federal criminal law that a provision which only punishes violations of a "law" does not cover violations of rules or regulations made in conformity with that law. It is therefore argued that § 6 of the Criminal Code does not embrace violations of rules or regulations and that § 11 filled that gap by adding "rules or regulations" to the

force and violence clause. Here again the legislative history leaves that question wholly to conjecture. *United States* v. *Eaton*, turned on its special facts, as *United States* v. *Grimaud*, 220 U. S. 506, 518-519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute. The *Eaton* case involved a statute which levied a tax on oleomargarine and regulated in detail oleomargarine manufacturers. Sec. 5 of the statute provided for the keeping of such books and records as the Secretary of the Treasury might require. But it provided no penalty for non-compliance. Other sections, however, laid down other requirements for manufacturers and prescribed penalties for violations. Sec. 20 gave the Secretary the power to make "all needful regulations" for enforcing the Act. A regulation was promulgated under § 20 requiring wholesalers to keep a prescribed record. The prosecution was for non-compliance with that regulation. Sec. 18 imposed criminal penalties for failure to do any of the things "required by law". The Court held that the violation of the regulation promulgated under § 20 was not an offense. It reasoned that since Congress had prescribed penalties for certain acts but not for the failure to keep books the omission could not be supplied by regulation. And Congress had not added criminal sanctions to the rules promulgated under § 20 of that Act. The situation here is quite different. Sec. 11 of the present Act makes it a crime to do specified acts, either by way of omission or commission, in violation of the Act or the rules or regulatons issued under it. Thus it is a felony for a person to "fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act". Sec. 11 is therefore a law of the United States which imposes criminal sanctions for disobedience of the selective service regulations. Since Congress has made the violation of regulations a felony, it can hardly be contended that those regulations are not a "law" for the purposes of § 6 of the Criminal Code. But though we assume that *United States* v. *Eaton* was a reason for adding a conspiracy clause to § 11, we cannot assume that the one which was added had the narrow scope suggested. Whatever the reason, words mean what they say. And if we give the words "conspire to do so" their natural meaning, we do not make the Act a trap for the innocent.

A dissenting opinion by Mr. Justice FRANKFURTER, in which Mr. Justice ROBERTS, Mr. Justice MURPHY and Mr. Justice RUTLEDGE joined, while rejecting "artificially restrictive interpretations" of criminal statutes, states:

It is difficult for me to believe that if one were reading § 11 without consciousness of the problem now before us and merely as a matter of English one would make the "so" in the phrase "conspire to do so" relate back to all that is contained in the twenty-two preceding lines rather than to the "force or violence" clause immediately preceding. The structure of the sentence, grammar, and clarity of expression combine to attribute to the phrase "to do so" a limited reference instead of making "so" carry the burden of the whole paragraph as antecedent. Good sense reinforces these textual considerations. It is made an offense to conspire to violate not only the seven substantive offenses enumerated by Congress but also the multitudinous "rules and regulations". There is an obvious difference between conspiracies to violate by force and violence any rule issued under the Act and a mere unexecuted arrangement between two people peacefully to escape one of such rules.

Support for this view is found in the legislative history of the provisions, and in the effect which it is urged may be given the conspiracy portion of Section 11 even if not construed as broadly as in the prevailing opinion. The dissent further states:

The Government also fails to take into account that the conspiracy provision of § 11 added considerably to the scope of § 6—that the net of § 11 would catch many offenders left free by § 6 of the Criminal Code. The latter merely reaches conspiracies to obstruct by force the operation of "any law of the United States". For more than half a century, ever since *United States* v. *Eaton*, 144 U. S. 677, it has been the settled principle of federal criminal law that a provision merely punishing violation of a "law" does not cover violations of rules or regulations made in conformity with that law. See *United States* v. *Grimaud*, 220 U. S. 506, 518-519. Section 6, therefore, does not cover violations of rules or regulations. Section 11 of the 1940 Act made an important addition in that it punishes conspiracies, to interfere forcibly not merely "with the administration of this Act" but also with "the rules or regulations made pursuant thereto".

United States v. *Eaton* is not a judicial sport. It is the application of a principle which has been undeviatingly applied by this Court—most recently in *Viereck* v. *United States*, 318 U. S. 236, 241—and upon the basis of which Congress legislates . . . The principle is that a crime is defined by Congress not by an executive agency . . . "Where the charge is of crime, it must have clear legislative basis." It is only when Congress in advance prescribes criminal sanctions for violations of authorized rules that violations of such rules can be punished as crimes. It is this far-reaching distinction which, it was pointed out in the *Grimaud* case, put on one side the doctrine of the *Eaton* case, where violation of rules and regulations was not made criminal, and on the other side legislation such as that enforced in the *Grimaud* case where Congress specifically provided that "*any violation of the provisions of this act or such rules and regulations* [of the Secretary of Agriculture] *shall be punished.*" (Italics added by Mr. Justice Lamar.) *United States* v. *Grimaud*, supra, at 515. Congress consciously gave an effect to the conspiracy clause of § 11 which is absent from that of § 6 of the Criminal Code.

The case was argued by Mr. James M. McInerney for the respondent and submitted by Mr. John W. Cragun and Mr. William Stanley for petitioners.

Taxation — Suit against State — Consent to Sue in Federal Court

A suit may not be instituted in a Federal court against a state official as such, without the consent of the state to such suit. Where legislative policy prohibits consent, the conduct of the state attorney general may not operate as a waiver.

Ford Motor Co. v. *Department of Treasury of the State of Indiana, et al.*, 89 L. ed. Adv. Ops. 372; 65 Sup. Ct. Rep. 347; U. S. Law Week 4115. (No. 75, argued December 7, 1944, decided January 8, 1945.)

The taxpayer sued in the United States District Court for a refund of gross income taxes measured by sales claimed by the state to have occurred in Indiana. The District Court, as well as the Circuit Court of Appeals, denied recovery. The Supreme Court, without deciding the merits, directed the complaint to be dismissed for want of the consent by the state to the suit.

The opinion of the Court, by Mr. Justice REED, stated first that the action was against a state official as such, and was therefore a suit

against the state:

> We are of the opinion that petitioner's suit in the instant case against the department and the individual as the board constitutes an action against the State of Indiana. A state statute prescribed the procedure for obtaining refund of taxes illegally exacted, providing that a taxpayer first file a timely application for a refund with the state department of treasury. Upon denial of such claim, the taxpayer is authorized to recover the illegal exaction in an action against the "department." Judgment obtained in such action is to be satisfied by payment "out of any funds in the state treasury." This section clearly provides for an action against the state, as opposed to one against the collecting official individually.

The Court then considered the question of whether the state had given its consent to the suit in the District Court, as required by the Eleventh Amendment. The intent to restrict such suits to state courts was found in the state statute which authorized "action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected." The sole remaining issue was whether the conduct of the Indiana attorney general afforded the requisite consent. The Court noted that the objection to the suit as a violation of the Eleventh Amendment was first made in the Supreme Court. The Court held that this was timely, and that the prior participation in the suit without objection did not operate as a waiver of the state's immunity. Conceding that the attorney general's conduct would constitute such a waiver if it were within his power, the Court found that the legislative policy of the state prohibited the delegation of such power to any official.

The opinion concludes with the following pragmatic justification for its decision:

> As we indicated in the *Read* case, the construction given the Indiana statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by state courts. The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law applicable to the questions raised.

Mr. Justice MURPHY took no part in the consideration or decision of the case.

The case was argued by Mr. Verne H. Miller for Ford Motor Company and by Mr. Winslow Van Horne and Mr. John J. McShane for Department of Treasury.

Taxation—Priority of Lien of United States

The priority of debts due to the United States is unaffected by liens of others, at least where such liens are not specific and perfected.

United States v. *Waddill, Holland & Flinn, Inc., et al.*, 89 L. ed. Adv. Ops. 251; 65 Sup. Ct. Rep 304; U. S. Law Week 4083. (No. 65, argued November 10, decided January 2, 1945).

This is an appeal from a decision of the Supreme Court of Appeals of Virginia in a proceeding under a general assignment for benefit of creditors, denying priority to a claim of the United States over a landlord's lien and a municipal tax lien. That court held that Section 3466 of the Revised Statutes, 31 U.S.C. § 191, which provides that "the debts due to the United States shall be first satisfied," did not affect the pre-existing liens in question.

The decision was reversed in an opinion by Mr. Justice MURPHY. The opinion states:

> The words of Section 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States. . . . But this Court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment. . . . It is within this suggested exception that the landlord and the municipality seek to bring themselves. Once again, however, we do not reach a decision as to whether such an exception is permissible for we do not believe that the asserted liens of the landlord and the municipality were sufficiently specific and perfected on the date of the voluntary assignment to cast any serious doubt on the priority of the claim of the United States.

The Court then analyzed the Virginia statutes to show that both liens were merely a "*caveat* of a more perfect lien to come." It conceded that the interpretation of the Virginia court is binding as "propositions of state law," but that such interpretation cannot control the federal question of whether a lien is specific and perfected for the purpose of superseding the priority of the United States.

Mr. Justice JACKSON dissented for the reasons stated by the Virginia court.

The case was argued by Mr. Paul A. Sweeney for United States and by Mr. Rutledge C. Clement for Waddill.

Summaries

Criminal Law—Venue

United States v. *Johnson*, 89 L. ed. Adv. Ops. 196; 65 Sup. Ct. Rep. 249; U. S. Law Week 4060. (No. 43, argued November 8, decided December 18, 1944).

An Act of Congress made it unlawful to use the mails or any instrumentalities of interstate commerce for sending or bringing into a state or territory any denture for which the cast was taken by a person not licensed to practice dentistry in the state to which the denture is sent. An information was filed in the District Court for the State of Delaware charging that Johnson and others put into the mail at Chicago dentures for delivery in Delaware, which violated the Delaware laws pertaining to dental practice and thereby

violated the Federal Dentistry Act.

The information was quashed on the ground that the prosecution could only be had in Chicago where the dentures were deposited in the mails. The Government appealed to the Supreme Court and the judgment of the district court was affirmed.

The opinion of the Court was delivered by Mr. Justice FRANKFURTER. It was said that "Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "The Trial of all Crimes . . . shall be held in the State where the . . . Crimes shall have been committed . . ." and it was said that this safeguard was reinforced by the provision of the Bill of Rights requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." The Elkins Act was examined and distinguished, in that the Federal Denture Act did not make "transportation" the offense.

Mr. Justice FRANKFURTER held the Act might be construed as authorizing the sender to be tried for his offense only in the district within which the sending was done (in this case Illinois) and the "importer" to be tried only in the district where his offense "importing" was committed.

Mr. Justice MURPHY filed a separate concurring opinion.

Mr. Justice REED filed a dissenting opinion.

The opening paragraph of his opinion discloses the basis of his dissent.

> The statute under consideration condemns the "use" of "the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory" any denture which has been made without compliance with the laws of that State or Territory, relating to the furnishing of such appliances.

The CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE joined in Mr. Justice REED's dissent.

The case was argued by Mr. W. Marvin Smith for the United States and by Mr. H. Albert Young for Johnson et al.

Appeals — Application Therefor Within Three Months

Georgia Hardwood Lumber Company v. *Compania De Navegacion Transmar, etc.*, 89 L. ed. Adv. Ops. 276; 65 Sup. Ct. Rep. 293; U. S. Law Week 4085, (No. 180, argued December 14, 1944, decided January 2, 1945).

Certiorari to determine whether an appeal in an admiralty case was properly taken to the Circuit Court of Appeals. Since the Rules of Civil Procedure do not govern proceedings in admiralty, the question presented was whether there was compliance with § 8 (c) of the Act of February 13, 1925, which provides that no appeal to a Circuit Court of Appeals shall be allowed "unless application therefor be duly made within three months after the entry of such judgment or decree."

Here notice of appeal was served and the notice was filed in the District Court clerk's office within three months of the final decree, and the judge was consulted as to the amount of the appeal bond. Formal petition for appeal was filed after expiration of three months, and it was granted. Both the District Court and the Court of Appeals held that the notice of appeal was sufficient application for an appeal and that failure to allow it was not fatal.

On certiorari the Supreme Court affirmed in an opinion by Mr. Justice DOUGLAS. While the Court intimates that the procedure here was not perfectly regular, it holds that the essential steps of an application in the form of a notice was made within three months with knowledge on the part of the District Judge of libelant's intent to take an appeal, and an actual allowance of the application was duly taken, and was sufficient, notwithstanding that the allowance of the appeal was made after expiration of the three month's period.

The case was argued by Mr. John Tilney Carpenter for the Lumber Company and by Mr. Wilbur E. Dow, Jr., for the Compania De Navegacion Transmar, etc.

Fair Labor Standards Act of 1938 — Application to Piece Rates

United States v. *Rosenwasser*, 89 L. ed. Adv. Ops. 249; 65 Sup. Ct. Rep. 295; U. S. Law Week 4084, (No. 106, argued and submitted December 12, 1944, decided January 2, 1945).

Direct appeal from a Federal District Court in California which sustained a demurrer to an information charging appellee, an employer, with violations of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act of 1938. The employer is engaged in the garment business and pays his employees at piece rates. The issue raised by the demurrer was whether the Act applies to piece rate workers.

The Supreme Court, in an opinion by Mr. Justice MURPHY, reversed the ruling of the District Court and held that the policy of the Act and its legislative history, as well as its plain words, afford no basis for excluding piece workers from the benefits of the Act.

Mr. Justice ROBERTS dissented without written opinion.

The case was argued by Mr. Ralph F. Fuchs for the Government and submitted by Mr. Victor Behrstock for the employer.

Taxation — Appeal from Tax Court — Venue

Industrial Addition Association v. *Commissioner of Internal Revenue*, 89 L. ed. Adv. Ops. 273; 65 Sup. Ct. Rep. 289; U. S. Law Week 4091. (No. 118, argued December 13, 1944, decided January 2, 1945).

The issue in this case was the propriety of a dismissal by a Circuit Court of Appeals of an appeal by the taxpayer from a Tax Court deci-

sion sustaining a deficiency. The taxpayer had filed no return. Within the three month period allowed after the decision of the Tax Court, the taxpayer filed its petition for review with the Court of Appeals for the Sixth Circuit. Upon being advised by the Commissioner that the proper tribunal was the Court of Appeals for the District of Columbia, the taxpayer and the Commissioner after the three-month period entered into a stipulation pursuant to I.R.C. § 1141 (b) (2) designating the Sixth Circuit as the court of review. The Commissioner, however, reserved the right to challenge the timeliness and legal effect of the stipulation. The Sixth Circuit dismissed the petition for review for want of jurisdiction.

The decision was reversed in an opinion by Mr. Chief Justice STONE. Distinguishing "venue" from "jurisdiction," the Court held that a timely petition for review had been filed, and that the stipulation cured the defect in venue. It was immaterial that such stipulation was not filed until after the expiration of the period allowed for filing the petition for review.

The case was argued by Mr. F. A. Berry for the Association and by Mr. Samuel O. Clark, Jr. for Commissioner of Internal Revenue.

Taxation — Constitutionality — State Tax upon Federal Housing Project

City of Cleveland et al. v. *United States*, 89 L. ed. Adv. Ops. 270; 65 Sup. Ct. Rep. 280; U. S. Law Week 4090. (Nos. 68-69, 388, argued December 6 and 7, 1944, decided January 2, 1945).

This decision covers three actions between the Federal Public Housing Authority and the Ohio taxing authorities. The substantive question in each was the exemption of property acquired by condemnation or purchase for low-cost housing projects. Upholding the exemption, the Court in an opinion by Mr. Justice Roberts stated:

> Little need be said concerning the merits. Section 1 of the Housing Act declares a policy to promote the general welfare of the Nation by employing its funds and credit to assist the states and their political subdivisions to relieve unemployment and safeguard health, safety and morals of the Nation's citizens by improving housing conditions. Section 5 provides in part, "The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any state, county, municipality, or local taxing authority." Section 13 authorizes agreements by the Authority to pay annual sums, not exceeding taxes which would otherwise be paid, in lieu of taxes.
>
> Challenge of the power of Congress to enact the Housing Act must fail. And Congress may exempt property owned by the United States or its instrumentality from state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary.

The Court held also that a court of three judges under section 266 of the Judicial Code had jurisdiction of an injunction proceedings, since the state officials "were enforcing state laws embodying a state-wide concern and in the state's interest." The case was argued by Mr. Joseph F. Smith for the City of Cleveland, by Mr. Ralph W. Edwards for Boyle, by Mr. Watson Hover for Guckenberger, and by Mr. Robert L. Stern for the United States.

Charles M. Hay
1881-1945

The House of Delegates lost one of its most colorful and effective leaders, with the death of Assembly Delegate Charles M. Hay, former State Delegate from Missouri, on January 16, at the age of 64.

As Deputy Chairman and Executive Director of the War Manpower Commission since July 1, he had worked beyond the limits of his strength, against his physicians' orders, because he had an intensely patriotic devotion to his country's success in the war. During the absence of Chairman Paul V. McNutt in Europe, Mr. Hay had been Acting Chairman, which further overtaxed his strength. Mr. Hay died within a few hours after Chairman McNutt returned to Washington.

He had been active in the American Bar Association since 1936. Because of his geniality and oratorical gifts, a speech by him on any subject was hailed with delight, even by those who did not agree with him. He was a member of the Association's Committee to Report as to Proposals for the Organization of the Nations for Peace and Law, and had taken an active part in its work.

Mr. Hay was born in Missouri. He had practiced law in St. Louis for many years, and had held many public offices and posts of leadership in his party. He was destined for still higher honors in the Association.

He typified the thoroughly representative character of the many points of view and experience in the profession of law, which are brought together for debate and action in the House of Delegates. His death at his post of duty in aid of the war effort gives an added significance to the earnest plea (30 A.B.A.J. 687) which brought to a climax his career in the House. His resolution, adopted unanimously by the House, and his impassioned appeal in support of it, asked for "all-out" efforts by all lawyers and citizens in behalf of maximum production for war. His own sacrifice of his life in that great cause reinforces the plea made in an editorial based on his resolution, in our January issue (page 27).

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW — *Wartime Powers as to Materials and Facilities — "The War Production Board Administrative Policies and Procedures":* What has turned out to be the "valedictory" of a distinguished public servant, and will be found to be also a most informative and useful chronicle, is the article contributed by John Lord O'Brian, who has since resigned as General Counsel for the War Production Board, to the December number of *The George Washington Law Review* (Vol. 13 — No. 1; pages 1-60). Associated with him in the preparation of the article was Manly Fleischmann, lately the Assistant General Counsel, capable son of a brilliant lawyer, all three of these men ornaments of the Buffalo (N.Y.) Bar.

Messrs. O'Brian and Fleischmann have performed a great service to the law and to public administration, in putting together this record of a most effective job undertaken and done, so far as Mr. O'Brian had the say, in a thoroughly American way. "The unique contribution of this agency", says Mr. O'Brian, "was that it devised and operated the vast system of controls which made possible the American achievement in war production." There could have been no greater, more urgent task than this race against time, starting not merely "from scratch" but from a handicap far back of "scratch" because of previous delays, fumbling and ineptitude. Surely no administrative agency ever had a greater need or a more plausible excuse for peremptory action in disregard of conventional processes and accustomed rights. Mr. O'Brian modestly, and justly, says that "It is thought that the administrative procedures above described not only met the constitutional requisites of due process, but conformed generally to the principles and standards of the democratic process. At any rate the motive which at all times dominated these policies and procedures was the desire to insure the maintenance of the standards of fair play to the fullest extent consistent with the requirements of all-out and ruthless war."

To be able to say such a thing and to have it generally believed and attested by those who know the facts, as to the work of the largest and most summary administrative agency ever created by any government, is an achievement of the American lawyer at his best. John Lord O'Brian knew no ideology, no faction, no "social objective", except to clear the way for the unprecedented production which was necessary, first, if the war was not to be lost, and then, if it was to be won. The whole article amounts to an answer and rebuke to many minor agencies which plead that they could not function at all unless they can arbitrarily disregard the standards of fair play which O'Brian set and maintained for the WPB. Beyond that, the article contains the most complete, authoritative and useful account which has been written, as to WPB procedures, structure and policies, albeit some of these are still being adapted to the changing conditions. (Address: The George Washington Law Review, Washington, D. C.; price for a single copy: $1.00).

ANTI-TRUST LAWS — *Devices for Evasion — Vertical and Horizontal Agency Agreements — "Agency as a Concept and Marketing Device under the Anti-Trust Laws":* One of the better discussions of the above topic, with citation and analysis of the cases, is contributed by Eugene J. Mulholland as the "editorial note" in the December issue of *The George Washington Law Review* (Vol. 13 — No. 1; pages 93-104). The areas of uncertainty, for lawyers and their clients, between the *General Electric* case, 272 U.S. 476 (1926), and the *Masonite* case, 316 U.S. 265 (1942), are explored. (Address: The George Washington Law Review, Washington, D. C.; price for a single copy: $1.00).

CONSTITUTIONAL LAW — *"Judicial Review and the Price Control Act":* The constitutionality of the procedural and the judicial-review provisions of the Emergency Price Control Act (56 Stat. 23, 765; 28 U.S.C.A. §901 *et seq.*, §961 *et seq.*) forms the basis of a note in the November issue of the *Boston University Law Review* (Vol. XXIV—No. 4; pages 250-265), by Margaret M. Quill of the Massachusetts Bar. Particular

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Editor's Note: This department provides a means by which practicing lawyers may find if the current law reviews and other law magazines contain material which may help or interest them, primarily as assistance in their professional work.

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of a current article.*

reference is made to the decision in the *Yackus* and *Rottenberg* cases (321 U. S. 414) and to the question as to whether Congress can vest in the Emergency Court of Appeals and the Supreme Court the exclusive jurisdiction to determine the validity of price regulations and thereby deprive the District Courts of the power to consider the validity of an administrative order which they are required to enforce by criminal process. Although the author concludes that the component parts of the procedural and judicial review provisions of the Emergency Price Control Act can withstand the tests of constitutionality, she states that these provisions, considered as a whole, "occupy a precarious position on the border line between constitutionality and unconstitutionality", and that "Only the war and the crying need for effective price control ought to justify the novel procedural provisions embraced in the Act." (Address: Boston University Law Review, 11 Ashburton Place, Boston, Mass.; price for a single copy: 70 cents).

CORPORATIONS – *Parent Corporations–Subsidiary Relationships –"Liability of a Holding Company for Obtaining for Itself Property Needed by a Subsidiary":* A note in the November issue of the *Harvard Law Review* (Vol. 58 – No. 1; pages 125-134), by Professor E. Merrick Dodd of the Harvard Law School, comments upon the recent decision of the New York Court of Appeals in *Blaustein* v. *Pan American Petroleum & Transport Company,* 293 N.Y. 281, 56 N. E. (2d) 705 (N.Y. 1944). The question there presented, on complicated facts, was whether a parent corporation and the individual directors of the subsidiary were liable for diverting to the parent concern various business opportunities which should have been kept open for the subsidiary. A majority in the Court of Appeals, affirming the judgment entered by the Appellate Division, held for the defendants.

Professor Dodd criticizes the effect of the decision, and devotes a major part of his comment to the findings of the trial court, which gave judgment for the plaintiff. He points out that the case "seems to be the first in which a parent corporation has been accused of using its control over the subsidiary's board of directors to divert to itself opportunities to which the subsidiary was equitably entitled." In view of the novelty of the case, the note might well have analyzed and reviewed more definitively the majority opinion in the Court of Appeals. (Address: Harvard Law Review, Cambridge 38, Mass.; price for a single copy: 75 cents).

CRIMINAL LAW – *"The Mentally Ill Offender in Federal Criminal Law and Administration":* Professor George H. Dession of the Yale Law School is known for his valuable contributions toward solutions for the difficult questions of the treatment of defendants mentally ill, in American criminal law. The most recent product of his work in this field is in the September issue of the *Yale Law Journal,* under the above title (Vol. 53–No. 4; pages 684-699). The article shows inadequacies in the federal procedure for dealing with mentally disordered defendants, both before and after conviction. Changes in federal statutes and in the practices in the field of prosecution are recommended. Professor Dession points out carefully that his suggestions are not intended to involve encroachment upon the functions of the individual states in the care and treatment of the mentally ill and defective, and that his study is directed to the improvement of federal procedure in a neglected field, as a corollary to a general revision of criminal law and procedure to meet modern and scientific approaches to the care of the insane. (Address: Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.25).

EVIDENCE – *"Declarations Against Interest–An Exception to the Hearsay Rule":* A lengthy and exhaustive analysis of the basis for the exception to the hearsay rule which makes admissible statements against the pecuniary or proprietary interest of the declarant is the leading article in the November issue of the *Harvard Law Review* (Vol. LVIII–No. 1; pages 1-69). The author, Professor Bernard S. Jefferson of Howard University, also is identified as chief counsel of the Meats Section, Price Legal Division, in the OPA. His article appears to be a product of research in connection with law school teaching. No drastic modification of the rule is proposed. The author's purpose seems to be to contribute precise analysis to the rationale by which statements against interest are justified as trustworthy evidence. He also indicates that the rigid requirements of the rule as developed haphazardly at common law should be reappraised in the light of both logic and experience. Thus, if unavailability of the declarant is one of the tests for the exception, other conditions of unavailability besides death should be acceptable. So also, if the postulate is that when one knowingly speaks against his own interest he is deemed to be telling the truth, a limitation of the exception to statements against pecuniary or proprietary interest appears to the author to be too restrictive. Reference is made to the development of a more liberal rule in Texas. The article embodies one of the most detailed and comprehensive surveys of the question, in the light of American decisions, since Wigmore. References are made also to the provisions of the American Law Institute's Model Code of Evidence, although Professor Jefferson appears not to be in agreement with the Code on all points. (Address: Harvard Law Review, Cambridge 38, Mass.; price for a single copy: 75 cents).

INTERNATIONAL LAW – *Adjudication of Disputes Between Nations – "Exclusion of Political Disputes from Judicial Settlements":* For lawyers who are trying to think through the contributions which international law and adjudication can make to lasting peace, an invaluable article by Louis B. Sohn, under the title quoted above, is in the October issue of *The American Journal of International Law* (Vol. 38—No. 4; pages 694-700). The text and the effects of the proposals made at various times by the principal Powers are analyzed against the background of the Dumbarton Oaks Conversations, to point up the central and difficult questions of jurisdiction as between the Security Council and the World Court and of vesting in the Court a power and duty to hear and determine disputes which cannot be decided in a *judicial* manner and according to law as thus far developed. Mr. Sohn submits tentatively a most constructive formula and provision, for inclusion in the basic instrument of the general international organization. (Address: The American Journal of International Law, 700 Jackson Place, N.W., Washington, D.C.; price for a single copy: $1.50).

LABOR RELATIONS LAW—*Maintenance of Union Membership —"Union Security in Wartime":* The second and concluding installment of the comprehensive analysis of the above subject by Miss Lucile Lomen, clerk to Mr. Justice Douglas of the Supreme Court of the United States, is in the November issue of the *Washington Law Review and State Bar Journal* (Vol. XIX—No. 4; pages 188-203). Her exposition began at page 133 in the issue which bore a July date-line, and was favorably commented on in 30 A.B.A.J. 634. (Address: Washington Law Review, Seattle, Wash.; price for a single copy of either issue: 50 cents).

MONOPOLIES—*"Anti-trust prosecutions of International Business":* In our December issue (30 A.B.A.J. 701) we commented on an article under the above-quoted title in the September issue of the *Cornell Law Quarterly,* and referred to the author, Israel B. Oseas, as "of the Anti-Trust Division" of the Department of Justice. Mr. Oseas asks us to state that he has not been a regular member of the staff of the Department of Justice since September of 1931 and that he has had no subsequent special appointment to prosecute particular matters since July of 1944. Accordingly, he says that the views expressed in the article published in September were his own and "do not necessarily represent in any way the views of the Department or any of its members." The biographical data given by the *Cornell Law Quarterly,* regarding contributors, in its September issue, referred to Mr. Oseas as having a 1944 special appointment to the Anti-Trust Division. We are informed that the corrected "copy" for his article was received by the *Quarterly* on June 30, 1944. Re-examination of the article and our comment on it, in the light of these facts, does not lead us to change our comments; our readers should examine both, if they are interested in the subject; and we are pleased to publish Mr. Oseas' disavowal.

MONOPOLIES – *Public Utilities – "Anti-Trust Laws and Public Callings: The Associated Press Case":* An interesting article in *The North Carolina Law Review* (Vol. 23—No. 1; pages 1-24), by Assistant Professor Benjamin F. Small of the University of North Carolina Law School, discusses *United States* v. *Associated Press,* 52 F. Supp. 362, in the light of the divergent remedies for business control afforded by the law of public callings and by federal anti-trust legislation. The author traces the development of the common law with respect to public callings and contracts and combinations in restraint of trade, and reviews a number of decisions by the Supreme Court which construe and apply the Sherman Act. His conclusion is that the public interest in news-gathering and reporting is sufficiently great to justify regulation of the Associated Press through either the public-calling theory or the anti-trust theory, but that these two types of business control should be clearly differentiated. (Address: The North Carolina Law Review, Chapel Hill, N.C.; price for a single copy: 80 cents).

PATENT LAW—*Contributory Infringement—Process of Method Patents—"The Tangle of Mercoid Case Implications":* No decision involving technical niceties of patent law has evoked such continuing consternation and confusion, on the part of lawyers in general practice as well as among those in the special field, as has the *Mercoid* case (320 U.S. 661). One of the most useful analyses of its complications and implications is by Laurence I. Wood, of the Chicago Bar, in the December issue of *The George Washington Law Review* (Vol. 13 – No. 1; pages 61-91). With all deference to the "Letter to the Editor" which expressed the view that the opinion of Mr. Justice Douglas is "a model of clarity and removes all uncertainty" (30 A.B.A.J. 539), the fact that the nine justices wrote five opinions, two of them for the majority and three opinions in dissent, leaves room for doubt as to how many members of the Court equally understood that in the paragraphs quoted the Douglas opinion "removes all uncertainty". To this possible reversion to the British practice under which each member of a court states separately and seriatim his opinion of the case, is now to be added the fact that the author of *Patents and Anti-trust Law* (1942) takes thirty-one pages to explain the implications of the supposedly obvious and that other commentators have devoted even more space to it, with conclusions as widely variant as those in the Court (Cf. 42 Mich. L. Rev. 915; 44 Columbia L. Rev. 447;

57 Harv. L. Rev. 574; 12 Geo. Wash. L. Rev. 345; 92 Univ. Pa. L. Rev. 461; 30 A.B.A.J. 454). Mr. Wood's comment on the vitality and application of the rule of the *Carbice* case (283 U.S. 27) is especially informative. No lawyer advising manufacturing or merchandising clients can tell when he will tangle with the *Mercoid* case; anyone may find this a good article to have handy. (Address: The George Washington Law Review, Washington, D. C.; price for a single copy: $1.00).

PATENT LAW — *"Industrial Property: A General Approach to Patents, Trademarks, and Copyrights":* In the December issue of *The North Carolina Law Review* (Vol. 23—No. 1; pages 25-27), Paul B. Eaton of the Charlotte, N. C., Bar gives an historical account of the origin of patent and trademark legislation and sets forth concisely what he regards as "highlights" in the law pertaining to industrial property, including patents, trademarks, copyrights, prints, and labels. (Address: The North Carolina Law Review, Chapel Hill, N. C.; price for a single copy: 80 cents).

REAL PROPERTY—*Mortgages—"The American Doctrine of Equitable Mortgages by Deposit of Title Deeds":* The limited recognition which American courts give to the English doctrine that an equitable mortgage may be created by depositing with a creditor a title deed of land, is discussed in the September issue of the *Notre Dame Lawyer* (Vol. XX—No. 1; pages 11-30), by Professor William D. Rollison, Faculty Advisor of that law review. Rejection of the doctrine has been based, in most American jurisdictions, on the Statute of Frauds or the registry laws, or on both. Where the deposit of the deed is by way of present security and also is accompanied by a parol agreement to execute a legal mortgage, and the promised loan has been partially or fully made, an action for specific performance by the depositee, Professor Rollinson suggests, should be assimilated to cases of an action for specific performance of an oral contract to convey land. (Address: Notre Dame Lawyer, Notre Dame, Ind.; price for a single copy: 75 cents).

TAXATION—*Deductions in Computing Net Corporate Income—"Reasonable Corporate Salaries":* Under Section 23 (a) (1) of the Internal Revenue Code, computations of net corporate income may deduct "a reasonable allowance for salaries or other compensation for personal services actually rendered." Bruce H. Johnson, Esq., of the Indianapolis Bar, in "Round Tables and Section Meetings" in the October issue of the *Indiana Law Journal* (Vol. 20—No. 1; pages 83-91), brings together decisions which have interpreted that section and offers practical suggestions for recording the facts concerning corporate salaries, in such a manner as may avoid controversy. (Address: Indiana Law Journal, 38 Maxwell Hall, Bloomington, Ind.; price for a single copy: 75 cents).

"Abraham Lincoln—Lawyer"

For all the years which can now be foreseen, an outstanding test of the stability and continuity of American institutions, and of the fidelity of lawyers and citizens to those institutions, will be the homage paid to the memory of the country lawyer who went from court-room battles on Illinois circuits to become President of the United States and Commander-in-Chief of its Army and Navy in a war which came often to the very gates of Washington.

Our cover portrait for this month is not a suspension of our series of lawyer-soldiers, as Abraham Lincoln was a soldier in young manhood and was Commander-in-Chief throughout the War between the States. An engaging portrait of the young Lincoln in uniform was on our cover for April, 1943. It seems appropriate nonetheless to join in commemorating this illustrious American lawyer, by putting a likeness of him again on our cover, for the month of his birth.

Particularly at a time when George R. Farnum is "on leave of absence" from writing the sketches which illumine our cover-portraits, we could not try to add anything new or noteworthy to all that has been written and said regarding the man who described himself as "Abraham Lincoln—Lawyer." He grows in stature as the years lengthen. So he should grow in the annals of his profession and in the faith and admiration of his country.

It has lately come to pass that few men, if any, are still alive who remember having seen him. "I knew Lincoln", is never heard. "I saw Lincoln" has not been lately heard. Many readers of this sketch have talked with men who knew Lincoln. The present and future generations can have no such privilege.

As Lincoln becomes thus a kind of legendary figure in his profession and his country, he is spoken of often by men who have little or none of his magnanimity and greatness of spirit, little or none of his staunchly American horizon and outlook, yet who seek to gain some prestige for themselves or their purposes by claiming him as having been a prophet or advance agent for their particular philosophy, ideology, party or group. Lincoln's portrait has been hailed by cheering masses in Madison Square Garden as that of the American prototype of Lenin; Lincoln has been appropriated by countless orators and writers as the first American to foresee and proclaim their own formulae for remaking the republic. Those who knew him and were active in his era are no longer here to combat this misappropriation.

American lawyers will do a most useful service if they perennially remind that the heritage of Lincoln's name and fame belongs to all Americans and to all who keep his faith; that he was truly of our own soil and solely of our own ideology; and that he was nurtured to greatness for the emergency by the breadth and humanity of his experience and life as a practising lawyer retained by men of the most important corporate clients of his day and region, trained also by his experience as a skilful, straight-thinking spokesman of public opinion on great issues, at first in his home community and circuit, then in his State, and finally in the Nation.

As President and Commander-in-Chief, Lincoln was what he had come to be as a country lawyer in a growing State. Numbers of American lawyers have had, and still have, in some varying measure, the homely and human qualities of patience, fairness, foresight, and understanding, which made Lincoln great. These qualities did not die, or disappear from the profession of law or from American communities, when his life was ended.

Lincoln was a colorful individualist in the most individualistic of all American professions and vocations. He talked of "the common people," the "plain people," but in no terms of class consciousness or mass ideology. His thought of them was still in terms of individual human beings, entitled to freedom and opportunity under equal laws, freedom and opportunity of their own making and through their own work. He showed no traces of belief that government had prerogatives or powers above the individual, or that "security" for all individuals should be bestowed by government rather than wrested from the soil by toil.

The simple fact is that Lincoln's social, economic, political and legal philosophy was the product of his times and his experience, and would be far to the "right" of what the most conservative or "reactionary" leader could espouse in this day. It is idle to speculate as to what his philosophy and platform would have been in present or recent days—there are few guide-posts. He was far-seeing, and his creed was intensely American and individualistic. To try to conjure his probable support for this or that ideology, panacea, or group, if he were alive today, does a wanton injustice to his memory. He may best be recalled always as a great lawyer, a rugged American, a deep humanitarian, whose philosophy and methods were suited to his time.

RENEGOTIATION STATUTES

(Continued from page 74)

has any Senator or Congressman stood up and voiced the opinion that the standards were sufficient.[52] It seems that Congress followed the reasoning as given above by Representative Disney, namely, that these standards would not have to meet judicial requirements because they were always contractually agreed upon. This position is also taken by Charles S. Collier in *Law & Contemporary Problems*, where he said:[53]

> We are dealing with a standard which, however unsatisfactory intrinsically, has been contractually accepted by individual citizens and corporations who have also agreed to the authoritative interpretation of the standard by officials of the United States Government.

This may be true as to prime contracts but it is patently wrong as to sub-contracts without a renegotiation clause, as well as to such prime contracts which were entered into before the passage of the Renegotiation Act and are made subject to renegotiation not by contractual agreement but by retroactive legislative fiat. We have the strange situation that Congress passed a statute in the opinion that it was unconstitutional if it would have to be statutorily applied.[54] But Congress disregarded that fact because of the erroneous opinion that all contracts were contractually renegotiable.

It is frequently reasoned that the Supreme Court is likely to uphold the statute nevertheless because the Court itself practically requested the passage of such a statute in the opinion it rendered in the *United States* v. *Bethlehem Steel*[55] case. In this case, however, the Court said as follows:

> To meet this recurrent evil (war profiteering) Congress has at times taken various measures. It has authorized price fixing. It has placed a fixed limit on profits, or has recaptured high profits through taxes. It has expressly reserved for the Government the right to cancel contracts after they have been made. Pursuant to Congressional authority, the Government has requisitioned existing production facilities or itself built and operated new ones to provide needed war materials. It may be that one or some or all of these measures should be utilized more comprehensively, or that still other measures must be devised.

Congress has not adopted in this case any of the measures enumerated by the Supreme Court but has devised a new one and it is quite clear that the Supreme Court cannot be shouldered with the responsibility for the choice of an unconstitutional new means.

Finally, it is argued that public interest makes it necessary to approve of the renegotiation statute. This is not so, for if the first renegotiation statute should be declared unconstitutional, the consequences would surely not be detrimental to the purposes of the Act. For only contracts entered into before passage of the Renegotiation Act, which this Act attempts to subject retroactively to renegotiation, would be exempt from it.[56] This result, however, is desirable because, as will be seen, the retroactive feature of the renegotiation statute is repulsive to our Constitution anyway. All contracts, however, which carry a contractual renegotiation clause will remain subject to renegotiation. Insofar as substantial subcontracts are concerned, they will be only subject to renegotiation if the prime contractor has discharged his contractual duty to insert a renegotiation clause in them. In cases where the prime contractor has violated this duty by omission, the Government would still not lose since then the prime contractor will have to pay over the excessive profits which the Government otherwise would have been able to recover from the subcontractor as damages for breach of contract.

B. *The Statute as Amended by the Revenue Act of 1943*

The Revenue Act of 1943 introduced a number of standards which were supposed to alleviate the insecurity created by the lack of standards which existed until then.

The question arises whether these new standards are sufficient to make the amended Act valid insofar as the delegation of the power is concerned.

The new standards are a standard of reasonableness with specific qualifications.

Are these standards sufficient within the interpretation given in the *Schechter*[57] case? Are they a delegation of legislative authority which is confined, not vagrant and canalized within banks to keep it from overflowing"? To determine that, we first have to find whether our law has recognized a general standard of reasonableness.

Originally, reasonableness was only considered a standard if it related to a rule of conduct or a norm the knowledge of which could be put into the minds of the "reasonable men" or the law.[58] An example of that concept is the *Union Bridge*[59] case in which the reasonable height of bridges was in question. Other examples are the

52. Only two instances could be found, viz:

Senator McKellar, on June 18, 1943 (Legislative Materials, p. 250) said: "It is true that the renegotiation law does set up a legislative standard of reasonableness."

This does not conform with the opinion which the same Senator voiced on April 23, 1942 (Legislative Materials, p. 121) when he answered Senator Pepper's question, whether the bill contained "anything in the nature of a standard or a principle which might guide the Secretaries in the administration of the proposed law" with a short "No, sir."

Repr. Patman on May 17, 1943, in Legislative Materials, p. 226: "The price adjustment boards do not operate without a legislative standard. The law fixed a standard of reasonableness and any more precise formula is not feasible."

53. *Supra*, p. 364.

54. So for instance said Senator Hayden in Legislative Materials, p. 131:

"I entirely agree with the Senator (Overton) that from the legal standpoint no contract can be renegotiated except as the result of an agreement between the contractor and the government."

And Repr. Jenkins in Cong. Rec. H. 78th Cong., 1st Sess. Vol 89, p. 10040 November 24, 1943:

"Those who sought to enforce the renegotiation law proceeded to renegotiate contracts which contained no renegotiation clauses and contracts on which the rights of the parties had all been established before the renegotiation law was passed."

55. 315 U. S. 289, 86 L. ed. 855.

56. See discussion by Collier, *supra*.

57. *Supra*.

58. Observe that seemingly the requirement that a business must be affected with a public interest is so broadly applied in wartime that practically every business can be regulated as to prices.

59. *Union Bridge* v. *United States*, 204 U. S. 364, 516 L. ed. 523, 27 S. Ct. 367.

rate-fixing cases for public utilities.[60] The common law knew already the connotation of reasonable rates for public utilities; it had developed very definite rules underlying the concept of reasonableness in that respect. These rules were known to the law and, therefore, form a sufficient circumscription of the meaning of the word "reasonableness" of public utility rates.

The Secretaries Are Not Experts

But modern interpretation by the Supreme Court of the United States has somewhat broadened the application of this principle. For whenever the determination of reasonable rates was put into expert hands, the Supreme Court has upheld a standard of fair and equitable prices or reasonable prices.[61]

Here, however, we are confronted with something different. The power of determination is put into the Secretaries of the various Departments. While, for instance, the Bituminous Coal Board was thoroughly familiar with all aspects of coal production and coal trade, none of the Secretaries, in fact no human being, can be fully acquainted with the contingencies of all kinds of complicated manufacturing processes and requirements as are represented by the multitude of enterprises which are subject to fact-finding determination by the Secretaries or their delegates. Here we are not dealing with an expert body but with Secretaries or their delegates who, by the very nature of their task, have to grope in the dark for a proper result.

Still another consideration leads to the unconstitutionality of the amended statute for lack of proper standards. The cause for the necessity of delegating the rule-making power is that it is more practicable to have administrative bodies make detailed rules than adopt them within the framework of the statute.[62] But in renegotiation the "standards" have shown themselves incapable of interpretation. A look at Procurement Regulation 12 and the Renegotiation Regulations as issued by the War Contracts Price Adjustment Board shows that in spite of the best efforts these standards do not lend themselves even to administrative regulation. Congress did not find it practicable, and the administrative bodies found it impossible, to make proper rules. Neither could "canalize" and define the standards.

An identical dilemma was faced by the Supreme Court in matters relating to the Lever Act of the First World War. In *United States* v. *Cohen Grocery*[63] the standard "unreasonable charge" was at issue. Different courts had arrived at totally divergent results. The Court held the standard to be insufficient and Justice Cardozo followed this opinion in a civil case.[64] A different decision now would have to be a reversal of these two decisions.

Compare the ups and downs in a recent administrative renegotiation procedure,[65] in which the excessive profits first were found to be $50,000 even, then $40,000 even, then $20,000 even and then, by the next higher board, $40,000 even.

The even amounts alone are an indication of arbitrary determination, and if the standards of the Act were to be found sufficient, each one of these findings would have been a proper one! This one example shows that there is no proper channel designated within which discretion can rule. And this example can be multiplied at will.

Some renegotiation officials feel that efficiency of a contractor is to be taken for granted and that the standard means that a lack of efficiency will result in a decrease of the allowable profit, rather than actual efficiency in an increase! What is efficiency worth? What, for that matter, are any of the other standards worth?

The consequence of this kind of standards is that the individual contractor who is assigned for renegotiation finds himself on an unfathomable sea. Neither he, nor his accountant, nor his attorney, know within reason what the final determination will look like.

Conclusion

We feel that the Supreme Court would do the country a disservice were it to reverse itself and hold such standards sufficient. For thereby it would place into the hands of the three Secretaries such an enormous discretion that they would have the entire industry of this country at their mercy. It would be an authoritarian rather than a democratic power.

Congress was well aware of the insufficiency even of these standards. For when Representative Disney reported the amendment of February 25, 1944, to the floor of the House, he declared even the new standards to be insufficient for judicial adjudication in the opinion of the committee.[66]

Under these circumstances it should be expected that not only the original statute but also the statute as amended by the Revenue Act of 1943 will be declared invalid for lack of standards. For legal considerations, judicial precedent, practical requirements and the legislative history all require such a result.

The statute would be valid insofar as it is a statute of administrative guidance. Contractual renegotiation would go on without the necessity of tearing down our constitutional safeguards.

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60. *Columbus* v. *Public Utility Commission*, 292 U. S. 398, 78 L. ed. 1327, 54 S. Ct. 763. *Wichita* v. *Public Utility Commission*, 260 U. S. 548, 67 L. ed. 124, 43 S. Ct. 51.

61. *Sunshine Anthracite Coal* v. *Adkins*, 310 U. S. 381, 84 L. ed. 1263, 60 S. Ct. 907. *United States* v. *Rock Royal*, 307 U. S. 533, 83 L. ed. 1446, 59 S. Ct. 993. *Currin* v. *Wallace*, 306 U. S. 1, 83 L. ed. 441, 59 S. Ct. 379.

62. *United States* v. *Crimaud*, *supra*.

63. *Supra*.

64. *Standard Chemicals* v. *Wough*, *supra*.

65. *Mitchell* v. *Stimson*, Tax Court case, R. 66, pending.

66. Cong. Record 78th Cong. Nov. 30, 1943, Vol 89, p. 10250.

Associate Justice George R. Sutherland

The Supreme Court set aside the session of Monday, December 18, for a memorial to the late Associate Justice George R. Sutherland. On the morning of that day the Bar of the Supreme Court of the United States held a meeting in the Supreme Court Building to take appropriate action. Resolutions were adopted at that meeting and presented to the Court by the chairman of the Committee, the Honorable George Wharton Pepper as follows:

Resolutions

"George Sutherland was born at Stoney Stratford, Buckinghamshire, England, on March 25, 1862. Of his Scotch-Irish and English forebears he was always proud and it was to this racial blend that many of his distinguishing characteritsics may be attributed.

"When he was but eighteen months old his parents came to the United States and made their home in Utah. There his early life was lived and there, even in boyhood, he engaged in the man-making struggle for existence characteristic of the American frontier. At Brigham Young Academy he received his preliminary, if not his only academic education. In 1882 he entered the law school of the University of Michigan of which at the time Judge Thomas N. Cooley was dean. His law school experience, as he often stated in later life, marked the beginning of his intellectual development. After a brief period of intensive study he was admitted, in March, 1883, to practice in the Supreme Court of Michigan and joined his father in the general practice of the law in Provo, Utah.

"Immediately after his admission to the Bar he was married to Miss Rosamond Lee, of Beaver City. Of the three children of their marriage only Mrs. Walter A. Bloedorn now survives.

"While practicing with his father he accepted any business that came his way, whether civil or criminal. He often traveled miles on horseback through the mountains to try cases before justices of the peace. He defended many persons indicted under the Federal Anti-Polygamy Statutes and throughout his life he had the esteem and confidence of his Mormon neighbors.

"In 1886 he formed a partnership with Samuel R. Thurman, Esq., afterward Chief Justice of the Supreme Court of Utah. Entering politics he became an active member of the Liberal or Gentile Party opposed to the practice of polygamy, and later was influential in the organization of the Republican Party of Utah. When Utah finally attained Statehood in 1895 he was elected to the first State Legislature, where his legal ability was promptly recognized. In April, 1896, when the United States Circuit Court was organized for the District of Utah, he was admitted to practice before that tribunal. Thereafter, he became a member of the firm of Sutherland, Van Cott & Allison of Salt Lake City and on October 20, 1899, he was admitted to the Bar of the Supreme Court of the United States.

"Elected in the fall of 1900 to the United States House of Representatives as a Republican, he gave hearty support to all measures which he deemed to be for the public good. After serving one term he declined renomination and resumed practice with his old firm. However, he was not suffered to remain long in private life and in 1904 was elected to the Senate of the United States.

"During his service as a Senator he was active in the cause of judicial reform and took a leading part in the evolution of the Penal and Judicial Codes. During his first term the controversy over Senator Smoot's right to his seat became acute. While Senator Sutherland had opposed Smoot's nomination on the ground that no representative of the Mormon Church or of any other religious body ought to be sent to the Senate, yet when the people of Utah had fairly elected Smoot, Senator Sutherland vigorously and successfully supported the right of the Senator-elect to take his seat.

"In his second term Senator Sutherland became deeply interested in foreign affairs and in legislation relating to employers' liability, workmen's compensation, and labor relations. His great speech in July of 1911 in opposition to the movement for recall of judicial decisions made him a national figure.

"In September of 1916 he was elected president of the American Bar Association but when nominated for a third term in the Senate he was defeated at the polls by his Democratic opponent and former partner, Senator King. After his retirement he resumed the practice of law and found time to deliver a course of lectures at Columbia University and to make many important public addresses. In the years immediately preceding his elevation to the Bench he appeared in many cases before the Court of which he was so soon to become a member. He was appointed

by President Harding as counsel for the United States in the *Norwegian Ship* cases before the Permanent Court of Arbitration at The Hague. When, likewise under President Harding's appointment, he took his seat upon the Bench he was the fifth member of the Court from the date of its creation who had not been born a citizen of the United States or of the American Colonies.

"In the sixteen years of his service upon the Bench the opinions which he delivered covered a wide range of subjects. His intimate knowledge of the laws relating to land, mining, and irrigation in the Rocky Mountain and desert states was of special value to the Court when called upon to render decisions in this field. His own early fight against poverty and his sympathy for the pioneers of the great West who had turned a vast wilderness into a land of promise made him an advocate of the rights of men who acquired their property by labor and physical privation, but he had no sympathy with the speculator who accumulates his wealth by preying upon his fellows.

"It was in the field of constitutional law that he made his greatest contribution to our jurisprudence. Most of his judicial service was rendered in the closing years of that century of constitutional interpretation which began at the death of Chief Justice Marshall. This was the period in which the judicial tendency was to maintain a balanced and substantially equal dual sovereignty, with reliance upon natural law and the due process clauses of the Fifth and Fourteenth Amendments. It would be difficult to specify any one of his opinions as being the greatest that he wrote. In *United States* v. *Curtiss Wright Export Corp.*, 299 U.S. 304 (1936), he delivered the opinion of the Court which with clarity and force supports the doctrine that in the field of international relations the President is "the sole organ of the federal government" and as such possesses a power which does not require an act of Congress as a basis for its exercise. His dissenting opinion in the Minnesota Moratorium case (*Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934) is certainly one of the most powerful opinions ever written with an exclusively historical approach. His point of view is well illustrated by the following extract from the opinion:

> " 'The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promise to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.' "

"His felicity of expression and his mastery of clear and vigorous English were all the more remarkable when his limited opportunities for formal education are borne in mind. He was tenacious of his views without being pugnacious in asserting them. He never antagonized his associates and always retained their friendship and affection. His judgements were the result of independent reasoning. In the *O'Donoghue, Hitz,* and *Williams* cases, 289 U. S. 516-553 (1933) he delivered the opinion of the Court, holding that the Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts and that the compensation of their judges may not be diminished during their terms of office, thus distinguishing them from the Court of Claims and the Court of Customs Appeals. An illustration of his wholly impersonal approach is the disapproval expressed in this opinion of a dictum which his close friend and colleague, Mr. Justice Van Devanter, had previously uttered in the *Bakelite* case (279 U. S. 438; 1929).

"Although even as a child he had struggled for self-support, he could not bring himself to uphold the constitutionality of the Federal Child Labor legislation. Similarly, it was his view that the minimum wage law of the District of Columbia was unconstitutional in that (to quote the language of his own opinion) 'it exacts from the employer an arbitrary payment for a purpose and upon a basis having no casual connection with his business, or the contract or the work the employee engages to do. The declared basis . . . is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals.' (*Adkins* v. *Children's Hospital*, 261 U. S. 525; 1923). He was firm in his belief in the Bill of Rights and wrote the opinion of the Court in the Scottsboro case (*Powell* v. *Alabama*, 287 U. S. 45; 1932) and many others in which the rights and liberties of individuals were upheld.

"Perhaps the character of the man himself cannot better be described than in the words which he himself used when, in 1941, he spoke thus to the graduating class of his Alma Mater, the Brigham Young University:

> " 'Good character does not consist in the mere ability to store away in the memory a collection of moral aphorisms that runs loosely off the tongue. Seneca gave the world a book of beautifully-written moral maxims; but he stood in the Roman Senate and shamelessly justified Nero's murder of his own mother. Character to be good must be stable—must have taken root. It is an acquisition of thought and conduct which have become habitual—an acquisition of real substance, so firmly fixed in the conscience, and indeed in the body itself, as to insure unhesitating rejection of an impulse to do wrong.' "

"He was the personification of his own ideals. This was the opinion of all who knew him and to this effect is the testimony of his associates in the letter which they addressed to him upon the announcement of his intention to retire from the Bench.

"His death on July 18, 1942, was the passing of a great American. The services at Washington Cathedral conducted on July 22, 1942, by the late Bishop Freeman were in keeping

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Current Events

The McCarran-Sumners Bill

With the opening of the Seventy-Ninth Congress on January 3, 1945, the McCarran-Sumners Bill was reintroduced in the Senate and House of Representatives. Senator Pat McCarran, chairman of the Senate Judiciary Committee, introduced it on January 6 in the Senate where it is now pending as S. 7. Chairman Hatton W. Sumners of the House Judiciary Committee introduced it in the House of Representatives on January 8 where it is now H.R. 1203.

This bill marks the culmination of some ten years of consideration, studies, reports and recommendations by various public and private bodies. Beginning in 1933 an able committee of the American Bar Association proposed the creation of a special administrative court. In 1937 the President recommended a sweeping reorganization of the federal executive branch upon the ground that the present form of administrative tribunal, which performs "administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution." These proposals were succeeded by a proposed administrative procedure act known generally as the Walter-Logan Bill. The latter was passed by Congress but vetoed by the President to await the conclusion of studies and the report of a committee —composed of government officers, judges, and lawyers — appointed to study the subject upon the recommendation of the Attorney General. The so-called Attorney General's Committee on Administrative Procedure made its report early in 1941. Thereafter, a subcommittee of the Senate Judiciary Committee held extensive hearings on the several pending legislative proposals, but suspended consideration with the imminence of war.

During the past year there has been a marked revival of interest both in and out of Congress with reference to administrative operations generally and to legislative proposals for an administrative procedure statute. Private and congressional interest has come to take two related forms: *First*, the adoption of a general administrative procedure statute. *Secondly*, the more specific definition of administrative powers as individual pieces of legislation involving administrative agencies come before Congress for adoption, revision, or renewal.

The McCarran-Sumners Bill has five features, namely: (1) provision for publicity of administrative law and procedure, (2) a statement of minimum procedural requirements as to the two basic forms of administrative operation—first, the making of general regulations, and, secondly, the adjudication of particular cases, (3) the specification and simplification of judicial review, (4) a statement of the common incidental procedural rights pertaining to any kind of executive authority, (5) limitation upon the types of penalties administrative agencies may impose. The McCarran-Sumners Bill undertakes to incorporate into law the minimum essentials required to achieve these basic purposes.

Refresher Courses for Lawyer War Veterans

An integrated program of lectures, clinics, and publications on the major fields of law will be available to lawyer war veterans under plans formulated by the Section of Legal Education and Admissions to the Bar in cooperation with the Practising Law Institute. This joint enterprise was authorized by the Association's Board of Governors. Many veterans are expected to take these refresher courses at Government expense under the provisions of the G. I. Bill of Rights.

The Practising Law Institute, a non-profit educational corporation, has been qualified by the Veterans Administration as an educational institution under that law. The program will be conducted in cooperation with state and local bar associations and law schools throughout the country. The basic aim is to facilitate the veteran's return to his profession. He will be given practical instruction and training in the lawyer's approach, working methods, and technique. However, the classes will not be restricted to veterans. Side by side with them will be practising lawyers whose professional careers were not interrupted, but who desire the training which the national program will make available.

Courses composing the lecture and clinic curriculum include general practise, trials, medical aspects of personal injury cases, real estate, wills and estates, and taxation. An important aspect of the program will be the publication of monographs giving a complete discussion of the topics dealt with and which will not require attendance at the lectures to be understood.

Officers and committees of local bar associations and deans of law schools interested in the refresher program should communicate with Russell M. Sullivan, Acting Adviser to the Section of Legal Education and Admissions to the Bar, Altgeld Hall, Urbana, Illinois, sending a duplicate copy of their letter to Harold P. Seligson, Director of the Practising Law Institute, 92 Liberty Street, New York 6, New York.

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakley, Dallas, Texas, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Income-Production Expense

In *McDonald* v. *Com'r*, (Nov. 20, 1944), reviewed in the January issue, the Supreme Court held that a judge's election campaign expenses could not be deducted under I.R.C. § 23 (a) (2) as an expense "for the production or collection of income". Against the vigorous dissent of four justices, and with one justice concurring in the result without opinion, the prevailing opinion by Mr. Justice Frankfurter stated that the 1942 amendment was designed only to permit deduction of income-production expense in *nonbusiness* transactions. Here, the Court reasoned, the expense "related to" the taxpayer's business; it was nondeductible under § 23 (a) (1) because it was not incurred in "carrying on" that business. Therefore the opinion concluded, no deduction could be obtained under § 23 (a) (2). The opinion apparently relied also upon considerations of public policy and upon the finality of the Tax Court decision which had also denied the deduction. Since it is impossible to guess upon which, if any, of these grounds the fifth member of the majority relied, the "law" on the major issue must still be considered unsettled.

It is somewhat ironic that Mr. Justice Frankfurter should have gone out of his way to state, "We should not be inclined to displace the views of the Tax Court with our own." Four days later (but apparently without benefit of the *McDonald* opinion) the Tax Court handed down an opinion which seems irreconcilable with the Supreme Court's rationale. The case involved litigation expenses on behalf of a child actor in connection with adoption proceedings and his parents' attempts to obtain his property from him. The deduction was allowed, with three concurrences in result and two dissents. The majority opinion emphasized the fact that these expenses related directly to his income from the "business" of acting and that these expenses "protected" his income and "conserved" his estate within the meaning of the statute. *Frederick C. Bartholomew Estate*, 4 T. C. #44.

Another important decision has further restricted deductions on account of expenses for tax advice and litigation. In *Com'r* v. *Kenan* (Nov. 10, 1944), rev'g *Mary L. Bingham Trust*, 2 T.C. 853, the Second Circuit disallowed a deduction to a trust for the cost of tax litigation arising out of the distribution of trust corpus. There were disallowed also legal fees for advice in connection with the distribution of the trust property and the winding up of the trust. In view of the nearly consistent denial of deductions for tax advice and litigation, a bill has been introduced in the House (H.R. 5550) which would specifically grant the deductions. There is no present indication, however, that this bill is slated for passage.

Time of Income Realization

A pair of recent Tax Court decisions illustrates some of the difficulties in determining when a taxpayer "realizes" income for services.

In *Walter I. Bones*, 4 T. C. No. 51, the taxpayer was a branch manager working on a commission basis, and reporting income on a cash basis. Toward the close of 1941 he was discharged, and a check was mailed to him stated to be in full settlement of commissions due. The taxpayer inquired whether this included unshipped orders, but he received an equivocal reply. Being unwilling to jeopardize his claim to additional commissions, the taxpayer did not cash the check. Not until February, 1942, was the taxpayer assured that he would be paid any additional amount owing to him, and at that time he deposited the check which he had received in 1941. The government contended that the amount of that check was 1941 income. The Tax Court held that it was not income until 1942, even if cashing the check would not have resulted in a binding accord and satisfaction. The court realistically stated that the taxpayer's fears were reasonable, and that he was not in constructive receipt of income since he had prudently rejected the condition to which it was subject.

The second case illustrates a much less realistic attitude toward the economics of income realization. In complete disregard of recognized accounting practice, it seems to be settled tax law that income is realized when it is received or accrued (depending upon the taxpayer's accounting method), even though that income has not yet been earned. Moreover, no corresponding deduction is allowed for a reserve representing the estimated cost of earning that income. Thus, in the fairly recent case of *South Tacoma Motor Co.*, 3 T. C. 411, the taxpayer sold coupon books for automobile service, agreeing to render services to its customers upon the presentation of the coupons over a period extending beyond the taxable year, and agreeing also to refund the sales price upon any customer's request. The Tax Court held that the entire sales price was includible in income in the year of the sale of coupon books, not merely the portion of the proceeds represented by services actually ren-

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Junior Bar Notes

by T. Julian Skinner, Jr., SECRETARY JUNIOR BAR CONFERENCE

A substantial increase in Junior Bar activity throughout the nation has been noticeable during recent months. This apparently has resulted from a realization on the part of those young attorneys who are not in the armed forces that they owe a distinct obligation to their fellow lawyers in the service to make certain that Bar work continues to go forward. Young lawyers as well as older ones recognize that the need for considering means of improving the administration of justice and for pursuing other normal Bar activities is as great during war time as during pre-war days.

Means of assisting lawyers returning from the service is the principal matter being given consideration by various state and local junior bar groups. Many of those groups have committees which are cooperating with the War Readjustment Committee of the Junior Bar Conference and with other committees and sections of the American Bar Association in their efforts to make the lot of the returning lawyer-serviceman an easier one. The Conference's committee, which is headed by Lyman M. Tondel, Jr., of New York City, has given much study to the problem and as a result it has recommended from time to time that certain action be taken by state and local bar groups in their respective areas which will be of material aid to returning military men. The committee has also taken steps itself which are calculated to aid the servicemen, such as arranging with West Publishing Company to publish the names of local bar representatives who will assist returning lawyers with their problems. In performing its work the Conference's War Readjustment Committee is working in conjunction with other sections and committees of the American Bar Association.

Tangible evidence of the work referred to in the preceding paragraph can be found in numerous states. In some jurisdictions, bar associations have designated committees or agencies to assist returning lawyers to locate employment or to establish themselves in private practice. In others, arrangements have been made for libraries and other facilities to be available without charge to returning lawyer servicemen for a period of time, and in still others legislation has been prepared which will exempt such servicemen from the payment of license and other fees for a year or more after they return to practice. Other benefits are also being accorded the veterans.

Although it is apparent to all in the Junior Bar Conference that the war is still in progress, it nevertheless is also true that lawyers of junior bar age are constantly being discharged from the service because of injuries or other causes. Efforts are being made to interest these individuals in bar work and to encourage many to become members of the American Bar Association. The Conference's Committee on Membership is devoting much time to such prospects and at the same time is urging other qualified lawyers to apply for membership. Ray Nyemaster, Jr., National Vice Chairman of the Junior Bar Conference, is serving as Chairman of the Conference's important Membership Committee. He reports increasing activity on the part of his committee.

CHARLES S. RHYNE
Chairman, Junior Bar Conference

The mid-year meeting of the Officers and Council of the Junior Bar Conference is usually held at the same time and at the same place as the House of Delegates of the American Bar Association holds its mid-year meeting. While it is understood that the House may meet in Dallas, Texas, in March, as originally planned it has been determined that the Officers and Council of the Conference will not meet at that time because of transportation restrictions invoked by the Federal government. If conditions will permit, the group probably will convene later in the spring.

Charles S. Rhyne of Washington, D.C., National Chairman of the Conference, James P. Economos of Chicago, Illinois, last retiring Chairman of the Conference, and T. Julian Skinner, Jr., of Birmingham, Alabama, Secretary of the Conference, met in Washington, D. C. on January 15-17 and discussed activities of the Conference. The meeting was deemed necessary, especially as war conditions apparently will prevent an early meeting of the Officers and Council.

The first issue of a news bulletin known as "The Young Lawyer" is being released from the press. It is contemplated that the bulletin will be published by the Conference two or three times each year, its purpose being to acquaint members of the Conference and others with the work of the Conference and the manner in

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*In military service.

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Low-Cost Legal Service Bureaus: John Kirkland Clark, 72 Wall St., New York 5, N. Y.

Membership: Robert R. Milam, Box 58, Jacksonville 1, Florida

To Report as to Proposals for the Organization of the Nations for Peace and Law: William L. Ransom, 33 Pine Street, New York 5, N. Y.

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Printing and Printing Costs: Morris B. Mitchell, First National-Soo Line Bldg., Minneapolis 2, Minnesota

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Secretary: Barton H. Kuhns, First National Bank Bldg., Omaha 2, Nebraska

Treasurer: Boyd M. Benson, Circuit Court, Huron, South Dakota

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term in 1945:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

The states of Indiana and Nevada will each elect a State Delegate to fill vacancies expiring at the adjournment of the 1946 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1945 must be filed with the Board of Elections not later than April 13, 1945. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. In order to be timely, nominating petitions must actually be received at the Headquarters of the Association before the close of business at 5:00 P.M. on April 13, 1945.

Attention is called to Section 5, Article V, of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group.)
>
> Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.
>
> Nominating petitions will be published in the next succeeding issue of the American Bar Association Journal which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the Journal. Special notice is hereby given that no more than fifty names of signers to any petition will be published.
>
> Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires. State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Board of Elections
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Laurent K. Varnum

Announcement

TO MEMBERS

The Committee on American Citizenship announces that it will conduct a prize contest for the best Statement of Principles, or Creed, on the following subjects:

1. The Responsibility of the Citizen as a Voter.
2. The Responsibility of the Citizen as a Juror.

There will be three prizes, the first $500.00; the second $250.00; and the third $100.00.

The contest is open to all members of the American Bar Association with the exception of its officers and the members of the Committee on American Citizenship.

Any contestant may write on either one or both topics. His entry on each subject shall be limited to 250 words, typewritten on one sheet of paper.

The Statement of Principles, or Creed, here called for must be prepared for this contest and not previously published. All right, title and interest in those submitted shall belong to the American Bar Association.

The decision as to prize winners will be made by the members of the Committee on American Citizenship, and in case of disagreement the decision of the Chairman of the Committee shall be final. The prizes will be awarded to the three best papers submitted, without regard to the subject chosen.

All papers must be submitted on or before May 15, 1945, and should be addressed as follows:

Committee on American Citizenship,

American Bar Association
1140 North Dearborn Street,
Chicago 10, Illinois

TAX NOTES

(Continued from page 105)

dered during the taxable year. This decision has been followed in the case of a "health club" which furnished facilities and services for various sports activities. The club, which was on the accrual basis, was required to report all amounts received plus accounts receivable for such services, even though these amounts represented advance payments for services to be rendered during the following year. *Your Health Club, Inc.*, 4 T.C. No. 46.

Estate Tax-Contingent Reversions

In *Lloyd Estate* v. *Com'r*, 141 F. (2d) 758, the Third Circuit cogently pointed out that a reversion contingent upon the lives of others is not subject to I.R.C. § 811 (c) and the *Hallock* case where the reversion is to the grantor *or his estate* upon the happening of the contingency. This is for the reason that the grantor's life or death does not affect the disposition of any part of the trust property. In such a case, if the value of the reversion can be actuarially computed, that value should be subject to tax under I.R.C. § 811 (a) as an "interest" in property held by the decedent at his death. Thus far, the majority of the Tax Court has not seemed to grasp this point. A recent decision, however, would seem to indicate a trend in that direction. In *Sallie H. Henry Estate*, 4 T.C. No. 52, the trust contained no express provision for reversion. Concededly, however, the trust would fail if the grantor's twelve grandchildren and great-grandchildren were not to survive the grantor's two children who were the life tenants. The government sought to tax the entire remainder value of a corpus of $5,110,710.82. The Tax Court held, however, that the tax applied only to the reversionary interest under § 811 (a). The value to the estate of this contingent reversion was actuarially computed as $8.20.

Pension to Semi-retired Officer

The Tax Court has allowed a corporation to deduct the annual compensation paid to its former president, where that compensation was reasonable in relation to the length and value of his prior services and to the limited services still rendered by him. The court pointed out that the statutory provisions for pension trusts are irrelevant to the deductibility of pensions actually paid. *General Smelting Co.*, 4 T.C. No. 40.

ASSOCIATE JUSTICE GEORGE R. SUTHERLAND

(Continued from page 103)

with the simplicity of his life and the reasoned certainty of his Christian faith.

"*Resolved,* That the Chairman of the Committee on Resolutions be requested to present these Resolutions to the Court with the prayer that they be embodied in its permanent records."

The Chief Justice directed that the resolutions be received and spread upon the minutes of the Court.

Mr. Attorney General Biddle then addressed the Court and spoke of the history and character of Mr. Justice Sutherland, in the House and Senate and as an Associate Justice of the Supreme Court. The Chief Justice then responded speaking of the twelve years on that Bench in close association with Mr. Justice Sutherland.

He commented on the service of Mr. Justice Sutherland as President of the American Bar Association after his retirement from the Senate in 1917, his service on the Advisory Committee to the International Armament Conference and recalled the circumstances of his appointment as Associate Justice.

The memorable addresses of the Attorney General and the Chief Justice are made a part of the Journal of the Court issued under date of December 18. It is regrettable that lack of space due to the rationing of paper prohibits the publication of those remarks in full.

JUNIOR BAR NOTES

(Continued from page 106)

which the work is done. Activities of the various state and local junior bar groups will also be reviewed in the bulletin. Sidney Sachs of Washington, D. C. is serving as editor of the publication.

Ellis M. Kopp of Bergenfield, New Jersey, has been appointed State Chairman for New Jersey, the State Chairman for that state having recently resigned.

W. Stuart McCloy of Memphis, Tennessee, State Chairman in that state, has appointed district chairmen, one to serve in each of three divisions in his state. He has likewise appointed committees to function in the state with representatives from each division or district on such committees. His organization should prove quite effective.

Walter B. Keaton of Rushville, Indiana, State Chairman for Indiana, reports that the program of the state junior bar group in Indiana is patterned on the national program of the Conference and that much work has been done. Special emphasis has been placed on setting up machinery to aid returning lawyer-veterans and in obtaining members for the American Bar Association.

John W. Vardaman of Anniston, Alabama, State Chairman in Alabama, has appointed state committees to pursue the activities sponsored by the Conference as well as to undertake certain special projects of a local nature.

REPLY BY DEAN POUND

(Continued from page 69)

supreme law of the land as provided for in Article 6 of the Federal Constitution. The Treaty being subsequent to such legislation, for instance, as the Boulder Canyon Project Act would supersede any provisions in conflict with or in derogation of it. Private rights which have accrued under the pre-existing law would simply have to give way to the interpretation put upon the Treaty by the American Commissioner to whom the ultimate power of interpretation and application is committed.

Thus there is no answer made to what I said before the House of Delegates as reported on pages 660 and 661 of the AMERICAN BAR ASSOCIATION JOURNAL for November, 1944. It would subserve no useful purpose to repeat what I said there.

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